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Supreme Court of the United States

OCTOBER TERM, 1996

HONEYWELL, INC.; HONEYWELL PENSION AND RETIREMENT COMMITTEE, on their own behalf and on behalf of the Honeywell Retirement Investment Plan, Investment Plus Plan of Honeywell, Inc., and Honeywell Retirement Savings Plan; AND FIRST TRUST NATIONAL ASSOCIATION,

Petitioners,

v.

MINNESOTA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Minnesota violated the Contract Clause or Due Process Clause when it retroactively extinguished a fully matured, non-contingent obligation to pay money due to a trustee of employee retirement and benefit plans in order to free up funds for payment to other workers, where the payment obligation was unambiguous under prior law, had been judicially confirmed more than five years earlier, and had been left in place by the state legislature, providing economic benefits to the obligor itself.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners are the sponsor, administrator, and trustee of certain employee-benefit and -retirement plans for employees and retirees of Honeywell.[1] Plan money was invested in certain annuity contracts—which were owned by the Trustee—when, in 1991, the issuing insurance company became insolvent and went into liquidation. The law in Minnesota, as confirmed by the Minnesota Supreme Court, unambiguously required that, upon such a failure, the Minnesota Life and Health Insurance Guaranty Association—respondent here—must assume the contractual obligations that the failed insurer owed to a contract owner, like the Trustee, who was a resident of Minnesota; and the Association for years relied on these types of trustee-owned annuities to expand its assessment base to raise the money to stand behind the State's insurance-industry guarantees. Upon the insurer's failure, the Association thus became the obligor on the annuity contracts.

When petitioners asked for payment on those obligations, however, Minnesota enacted a law that, in express terms, retroactively cancelled the Association's obligation to pay these assumed debts. The new law extinguished the Association's obligations to the Trustee as contract owner and directed, instead, that the Association make payment only to the individual trust beneficiaries who were Minnesota residents, but not to the non-Minnesota beneficiaries of the plan. At the same time, the law required the Association for the first time to assume liabilities to Minnesota workers covered by plans with out-of-State trustees. The legislature, in short, cancelled debts unambiguously owed to one party in order to free up money to pay other

[1] Pursuant to this Court's Rule 29.6, petitioners state: Honeywell, Inc., has no parent company; a list of Honeywell's nonwholly owned subsidiaries is included as Appendix H, *infra*; First Trust National Association is owned by First Bank System, Inc.; a merger of First Bank System, Inc. with U.S. Bancorp. is pending.

persons it thought more deserving. Petitioners' annuity contracts are the only ones in the State that are reached by this retroactive abrogation of a plain right to payment.

The United States Court of Appeals for the Eighth Circuit, by a fractured *en banc* court, nevertheless upheld the new law against a challenge under the Contract Clause and Due Process Clause. Petitioners seek review of that judgment.

OPINIONS BELOW

The opinions of the court of appeals sitting *en banc* (Pet. App. 1a-31a) are reported at 110 F.3d 547. The opinion of the court of appeals panel (Pet. App. 32a-49a) is reported at 86 F.2d 766. The final opinion of the district court (Pet. App. 50a-64a) is not reported. The opinion of the Minnesota Supreme Court on certification of two state-law issues (Pet. App. 67a-80a) is reported at 518 N.W.2d 557. The pre-certification opinion of the district court (Pet. App. 81a-115a) is not reported.

JURISDICTION

The judgment of the court of appeals sitting *en banc* was entered on April 2, 1997. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. §§ 1254(1), 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Contract Clause of the United States Constitution (Article I, Section 10, Clause 1) provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."

The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides, in Section 1: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

The Minnesota Life and Health Insurance Guaranty Association Act, Minn. Stat. Ann. ch. 61B, in effect at

the time of insolvency in this case (1991), is set forth in full at Pet. App. 116a-136a. Section 61B.06, subdivision 2, of the Act provided:

> Subd. 2. **Impaired foreign or alien insurer.** If a foreign or alien insurer is an impaired insurer under an order of liquidation, rehabilitation, or conservation, the association shall, subject to any conditions imposed by the association and approved by the commissioner, guarantee, assume, or reinsure or cause to be guaranteed, assumed, or reinsured, the covered policies of residents, and shall make or cause to be made prompt payment of the impaired insurer's contractual obligations which are due and owing to residents.

Section 61B.03, subdivision 5, provided:

> Subd. 5. **Contractual obligation.** "Contractual obligation" means any obligation under covered policies.

On April 27, 1992, a new statute, 1992 Minn. Laws ch. 540, art. 2, became law. Section 14 amended Section 61B.03, subdiv. 5, of the Guaranty Act to read:

> Subd. 5. **CONTRACTUAL OBLIGATION.** *(a)* "Contractual obligation" means any obligation under covered policies, *except as provided in paragraphs (c) and (d) of this subdivision.*
>
> *(b) For purposes of this chapter, contractual obligation includes an unallocated annuity contract which funds a qualified defined contribution pension plan pursuant to Internal Revenue Code of 1986, sections 401(k), 403(b), and 457.*
>
> *(c) Notwithstanding the definition of contractual obligation contained ~~in~~ paragraphs (a) and (b), contractual obligation does not include any obligation to nonresident participants of a covered plan or to the plan sponsor, employer, trustee, or other party who owns the contract; in such cases, the association is obligated under this chapter only to participants*

in a covered plan who are residents of the state of Minnesota on the date of impairment.

(d) Except as provided in paragraphs (a) and (b), contractual obligation does not include an unallocated annuity contract issued in connection with a defined benefit plan protected by the federal Pension Benefit Guaranty Corporation, or a contract issued to, or purchased at the direction of, any governmental bonding authorities, such as a municipal guaranteed investment contract.

Section 23 of the same 1992 Amendment provides that the foregoing provision was "intended to clarify existing law and [shall] apply to all covered policies or contracts issued or renewed by insurers which became insolvent after May 27, 1977."

STATEMENT

A. Statutory and Factual Background

1. Minnesota created the Guaranty Association, respondent here, so that the entire life and health insurance industry of the State would stand behind the obligations of each member of the industry. Consisting of all insurers who seek and obtain authorization to do business in the State (Act § 61B.04, subd. 1), the Association is governed by a Board of Directors approved by the State's Commissioner of Commerce (Act § 61B.05, subd. 1) and acts "under the immediate supervision of the commissioner" (Act § 61B.04, subd. 2). *See* Act § 61B.09, subd. 3 (Board decisions subject to review by the Commissioner); Pet. App. 94a nn.19, 20 (Commissioner's powers).[2] The Act states that its purpose is "to enable

[2] "Act" refers to the version of the Minnesota Life and Health Insurance Guaranty Association Act, reprinted at Pet. App. 116a-136a, that was in effect in 1991, the year of the insurer's failure at issue here. The Act was originally enacted in 1977 and was modified slightly over the years. A few changes in the Act were made

the guaranty of payment of benefits and of continuation of coverages" of failed insurers, that it "shall be liberally construed to effect" its purpose, and that the Association's members are "subject to assessment to provide funds to carry out" this purpose. Act § 61B.02, subd. 2, 3.

As relevant here, the Act declares that, when a non-Minnesota insurer becomes "impaired" and is placed under an order of liquidation, rehabilitation, or conservation,

> the association shall, subject to any conditions imposed by the association and approved by the commissioner, guarantee, assume, or reinsure or cause to be guaranteed, assumed, or reinsured, the covered policies of residents, and shall make or cause to be made prompt payment of the impaired insurer's contractual obligations which are due and owing to residents.

Act § 61B.06, subd. 2.[3] At the relevant times, the Act simply defined "contractual obligation" to mean "any obligation under covered policies" (Act § 61B.03, subd. 5) and "covered policy" to mean "any policy or contract owned by a Minnesota resident" within the Act's scope (Act § 61B.03, subd. 6), including "annuity contracts" issued by insurers authorized to transact business in the State (Act § 61B.02, subd. 1).[4] A "resident" under the

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between 1988, when the annuity contracts at issue were purchased, and 1991, when the insolvency triggered its application. *See* note 4, *infra*. In 1993, Minnesota recodified and somewhat modified the Act, but it left most of the substance unchanged, and the legislature provided that the pre-1993 version of the law continued to apply to cases like this arising out of earlier failures. *See* Pet. App. 69a n.4.

[3] Subdivision 3 of that section, immediately following the quoted directive, identifies conditions that the Association, in carrying out its duties under Subdivision 2, may ask the Commissioner to approve, such as the imposition of liens or moratoriums on certain payments. Act § 61B.06, subd. 3.

[4] The phrase "owned by a Minnesota resident" was added to the definition of "covered policy" in 1989. *See* Pet. App. 96a. Other

Act is "any person who resides in this state at the time the impairment is determined and to whom contractual obligations are owed." Act § 61B.03, subd. 13. The term "person" is not limited to individuals, but covers any "corporation, partnership, association or voluntary organization" as well. Act § 61B.03, subd. 12.

In order to fund its payment obligations to resident owners of covered policies, the Association is directed to make assessments on its members, *i.e.*, on all insurers authorized to do business in the State. Act § 61B.07, subd. 1. Insurers are assessed separately for each of three accounts —health insurance, life insurance, and annuities. Act § 61B.04, subd. 1. In the event that the Association must assume an out-of-State insurer's payment obligations in a particular account (under Act § 61B.06, subd. 2, quoted above), the member insurers are assessed according to the amount of "premiums received on business in [the] state" for that particular account, up to two percent annually of the insurer's yearly premiums for that account. Act § 61B.07, subd. 3(b), subd. 4.

In 1987, the Court of Appeals of Minnesota held that the Act covers "unallocated annuity contracts," including "guaranteed investment contracts (GICs)," which are "annuity contracts" that are "not issued to or owned by a named individual" but are "issued primarily under pension fund and profit sharing plans" to the trustee. *Minnesota Life and Health Ins. Guaranty Ass'n v. Department of Commerce*, 400 N.W.2d 769, 770 (Minn. App. 1987); *id.* at 775. (That construction was later confirmed by the Minnesota Supreme Court in its ruling in the present case. Pet. App. 75a.) By 1987, such unallocated annuity contracts had become prevalent nationwide and in Min-

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changes made in 1991 are indicated in the margin at Pet. App. 124a, 125a-26a, 134a-35a. Certain identified policies or contracts are excluded from the scope of the Act (Act § 61B.02, subd. 2), but none of those exclusions applies in this case.

nesota. As a result, since 1987, the Association relied on the premiums from (Minnesota-resident) trustee-owned unallocated annuities to expand substantially the base on which assessments could be and have been levied, thus benefiting from the larger reservoir backing insurers' annuity obligations. *Minnesota Life*, 400 N.W.2d at 771 (unallocated annuities expanded assessment base from $389 million to $641 million).[5] For five years, the Minnesota legislature took no step to alter the judicially confirmed coverage, even as it amended the Act in other respects. *See* note 4, *supra*.

2. In 1988, the Honeywell plans invested in guaranteed investment contracts issued by Executive Life Insurance Company of California, a California company (and hence a "foreign" insurer under the Act) authorized to transact business in Minnesota (and hence a member of the Association). The plans paid more than $111 million to Executive Life, which was to pay out the original investment, plus specified interest, minus withdrawals, on designated schedules ending by April 1993. As required under ERISA, the contracts were owned by the plan trustee (Pet. App. 74a-75a), who, soon after the 1988 purchase, became IDS Trust, a Minnesota resident, the predecessor of petitioner Trustee, also a Minnesota resident.

In April 1991, Executive Life "became insolvent and unable to fulfill its contractual obligations on the Honey-

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[5] *See* General Accounting Office, "Insurer Failures: Life/Health Insurer Insolvencies and Limitations of State Guaranty Funds," in *Insurance Guaranty Funds and the Involuntary Transfer of Insurance Policies*, Hearings before the Subcomm. on Antitrust, Monopolies and Business Rights of the Senate Judiciary Comm., 102 Cong., 2d Sess. 55 (1992): "Unallocated annuities are investment contracts typically purchased by businesses and state and local governments to fund portions of their retirement plans. . . . [T]hese contracts are generally marketed by insurers in competition with investment products sold by other financial institutions. . . . [According to one study of 174 large pension plans,] 28 percent of defined contribution plan assets were held in guaranteed investment contracts with insurance companies." (footnote omitted).

well GICs." *Id.* at 3a. In January 1992, the month after Executive Life was placed under an order of liquidation by a California court, petitioners formally requested that the Association make payment under the annuity contracts, the "contractual obligations" that the Act required it to assume. The Association put off an answer. *Id.* at 3a-4a.

Instead, in April 1992, the Minnesota legislature enacted an amendment to the Act's definition of "contractual obligation" that specifically cancelled the Association's obligation to the resident trustee—"the one to whom the contractual obligation was owed." *Id.* at 4a; *see* 1992 Minn. Laws ch. 540 [hereafter "Amendment"], amending Act § 61B.03, subd. 5 (quoted at pages 3-4, *supra*). The Amendment replaced that obligation to the contract owners with a new duty on the part of the Association to make payments to individual plan participants, but only those who reside in Minnesota. *See* Pet. App. 5a. The legislature thus wiped out the Association's obligation to the trustee, depriving all the out-of-State participants (roughly 27,000 of the 36,000 participants in the Honeywell plans) of the benefit of that obligation. *Id.* at 3a-4a. In so doing, the Amendment freed up the funds to make payments to a previously uncovered group, the roughly 10,000 Minnesota residents who were participants in *other* companies' pension plans that owned Executive Life annuities but had *non*-resident trustees—whose contracts, therefore, were not covered by the Act, either to receive protection or to add to the assessment base. *See id.* at 4a. The legislature specifically made the Amendment retroactive back to 1977, but it is uncontested that the only unallocated annuity contracts retroactively covered by this change in law are those of petitioners.[6]

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[6] It now appears that approximately 90% of the value of Executive Life annuities should be recovered as a result of the liquidation proceeding. Consequently, the amount actually at issue for the Association is far less than the $111 million described by the Eighth

B. The District Court and Minnesota Supreme Court Decisions

1. Petitioners brought this action in state court in Minnesota, seeking, among other things, a judgment that the 1992 Amendment's expressly retroactive cancellation of their contractual rights violated the Contract Clause and the Due Process Clause. The Association removed the case to federal court. Pet. App. 6a. On cross-motions for summary judgment, the district court agreed with petitioners that the 1992 Amendment was invalid under both clauses. *Id.* at 81a-115a.

In response to the Association's primary defense, *i.e.*, that the Amendment merely "clarified" the Act's coverage, the district court concluded that the Amendment in fact substantively altered the coverage that "the Act clearly and unambiguously provided" to the Trustee as contract owner. *Id.* at 93a; *see id.* at 89a-98a. The district court also concluded that the obligations cancelled by the Amendment were contractual in nature, pointing to the voluntary action of petitioners (in purchasing the annuities) and of the Association's members (in choosing to do business in Minnesota). *Id.* at 110a.[7] Moreover, "Honeywell's right to enforce [the Association's contractual] liability had become 'fully perfected and vested' prior to the Amendment" (*id.*), because " 'nothing remain[ed] to be done by the party asserting [the liability]' " (*id.* at 105a). The Amendment therefore was unconstitutional under several of this Court's decisions, particu-

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Circuit. Although there is no established figure in the record, the Association stated below, in what petitioners believe to be a significant overestimate, that the amount now at stake is about $25 million. The amounts that the 1992 Amendment newly required to be paid (to previously uncovered Minnesota-resident beneficiaries of plans with out-of-State trustees) is roughly comparable to the amounts stripped from petitioners.

[7] Minnesota's Commissioner testified before Congress in 1992: "The fund is really the insurance companies that stand behind it." *Hearings, supra,* at 81.

larly *Coombes v. Getz*, 285 U.S. 434 (1932), which held that California had violated both the Contract Clause and Due Process Clause by repealing a law making corporate shareholders responsible for the corporation's contractual debts to others upon certain occurrences, where the repeal was made retroactive to extinguish already matured obligations. Pet. App. 103a-111a.

2. Shortly after its ruling, the district court reconsidered its ruling and decided to certify two questions to the Minnesota Supreme Court: (1) did the 1992 Amendment "clarify the Association's coverage obligations under the Act or effect a substantive change in those obligations?" and (2) "[i]s the right to payment created in favor of annuity contract owners in [Act] § 61B.06, subd. 2 a purely 'statutory' right or a right that is 'contractual' in nature?" *See* Pet. App. 73a. The Minnesota Supreme Court answered both questions as a matter of state law. *Id.* at 67a-80a.

The Minnesota Supreme Court observed that unallocated annuity contracts like the guaranteed investment contracts at issue, which had been the subject of the 1987 *Minnesota Life* ruling, were well understood by that time to be owned by plan trustees, not by individual participants, and were covered under the comparable statutes of at least 14 other States. *Id.* at 74a, 76a. The court specifically rejected the Association's contention that payment to the trustee represented an "unintended windfall," concluding that "resident trustees who own unallocated annuity contracts are *unambiguously* entitled to coverage under the terms of the Act prior to the Amendment," and "[t]he Association *is obligated to guarantee* the covered policies of residents." *Id.* at 75a (emphasis added). The court ruled that there was "no doubt" that the trustee was owed "contractual obligations" (*id.*) and that resident trustees, as contract owners, were "plainly entitled to coverage" (*id.* at 76a). *See id.* at 78a ("the statute is unambiguous"). The court also explained that the Association had

in fact been taking advantage of this coverage for its own funding:

> [T]he Association prior to 1992 assessed insurers issuing unallocated annuity contracts based upon the amount of premiums received from resident contract owners, not based upon amounts attributable to individual resident beneficiaries. One expects the Association would not have assessed members based upon the amount of premiums received from resident contract owners if it understood coverage obligations to be owed solely to resident plan participants.

Id. at 77a (footnote omitted). The state supreme court thus held that the 1992 Amendment substantively changed the Act by wiping out the Association's obligation to the Trustee. *Id.*

The court answered the second certified question briefly (*id.* at 79a-80a), holding that "the right to payment is a purely statutory right under state law" (*id.* at 79a). The court stated that, "[t]o the extent an annuity contract owner enjoys any rights against the Association, it is because they are set forth in a statute." *Id.* (footnote omitted). It added that the Association's "statutory obligations are not coextensive with the contractual obligations of a failed insurer" (*id.*), though it did not indicate that a partial guarantee was any less contractual or, more pointedly, rule that the Association or the Commissioner either were empowered to cancel annuity obligations owed to annuity owners or ever had done so.[8] Finally, the

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[8] The court noted the provision that the Association's obligations are "subject to any conditions imposed by the association and approved by the commissioner," a provision immediately followed by authorization merely for moratoria and liens (Act § 61B.06, subd. 2, 3). The court also cited the provision setting aggregate liability limits for life-insurance policies (Act § 61B.06, subd. 8), which the court expressly held did not apply to annuities owned by trustees (Pet. App. 79a). The court also had declared earlier in the opinion: "The Association is obligated to guarantee the covered policies of residents." *Id.* at 75a.

court concluded that no contractual relationship exists between the Association and *its members,* because that relationship is required by statute (*id.* at 79a-80a), and it asserted that "[t]here exists no contractual relationship between the Association and annuity *contract owners*" (*id.* at 79a (emphasis added)), though it did not specifically address whether a contractual relationship existed between the Association and contract owners once the insolvency triggered the Association's assumption of the contractual obligations, as had occurred here before the Amendment wiped out the obligation.

3. After the state supreme court rendered its opinion on the certified state-law questions, the district court changed its mind about the merits of petitioners' federal constitutional challenges, which it now rejected. Pet. App. 50a-64a. It rejected the Contract Clause claim in reliance on the state supreme court's ruling that the Act created statutory, but not contractual, rights under state law. *Id.* at 62a-64a. For essentially the same reason, the court also now concluded that petitioners had no vested rights such as those protected under *Coombes* (*id.* at 56a-60a) and that due process was satisfied because the Amendment rationally served the asserted legislative purpose "to protect resident plan participants and avoid an unintended windfall for non-residents" (*id.* at 61a)—though the state supreme court had expressly rejected the claim of "unintended windfall" (*id.* at 75a-76a).

C. The Court of Appeals Rulings

A panel of the Eighth Circuit affirmed (*id.* at 32a-49a), but the full court decided to rehear the case *en banc* and itself affirmed the district court's rejection of petitioners' constitutional challenges. *Id.* at 1a-31a. The court was divided on the result 7-5, and it produced three separate opinions. On the Contract Clause issue, there was no majority rationale for rejecting the claim. Indeed, a majority of the *en banc* judges agreed that the Amendment substantially impaired their contracts, and of the seven

judges who went on to address whether this impairment was nevertheless justified, five concluded that it was not.

Judge Hansen, joined by only four other judges, concluded that the Amendment was consistent with the Contract Clause on the ground—rejected by the other seven judges of the Eighth Circuit—that the obligation extinguished by the Amendment was not a contractual obligation. *Id.* at 9a-10a. Judge Hansen reasoned that the Act did not create any contractual obligation against the State itself (*id.* at 9a) and that the Association's obligations to a contract owner—even, apparently, after the occurrence of the insurance company failure that triggered the mandated assumption of the annuity—were "statutory in nature rather than contractual," because the contract owners did not bargain with the Association and the Act's requirement of assumption of covered annuities by the Association did not "affect the validity, construction, and enforcement" of those annuity contracts. *Id.* at 10a (citing *General Motors Corp. v. Romein*, 503 U.S. 181, 189 (1992)). Having concluded that the impaired obligations were not "contractual," Judge Hansen and his colleagues did not address whether the impairment was justified under Contract Clause standards.

Judge Hansen, speaking for a majority, also rejected the due process claim, though stating that it "presents a closer question." *Id.* at 10a. *See id.* at 19a (Judges Loken and Bowman concurring in this part of Judge Hansen's opinion). This majority acknowledged the strong protection afforded accrued rights to payment (or "vested rights") under *Coombes* and related precedents, but it reasoned that those precedents, though never overruled, were now of questionable validity and expressly chose to "rely instead on the more recent Supreme Court pronouncements of substantive due process analysis for economic legislation, which articulate a rational basis test." *Id.* at 12a, 14a. The majority then found that test satisfied, despite the fact that the trustees (and non-

resident plan participants) whose funds were being used to pay for this new protection were in no way responsible for the plight of the benefited class, thus distinguishing the present case from this Court's recent cases involving retroactive imposition on employers of additional obligations to employees for harms traceable to the employment relationship. *Id.* at 17a. The court reasoned that Minnesota had a legitimate purpose in providing economic protection to its own resident plan participants (*id.* at 15a) and that the Amendment was "curative in nature, even though it worked a substantive change in the law" (*id.*), because payment of the obligations to the resident trustees would be "an unintended windfall" (*id.* at 16a). Relying centrally on *United States v. Carlton*, 512 U.S. 26 (1994) (*see* Pet. App. 12a-16a), the majority concluded that the 1992 Amendment "cure[d] a drafting defect" in the Act (*id.* at 16a)—without mentioning that it had been clear since 1987 that unallocated annuities owned by resident trustees were covered, that such coverage was unambiguous under the Act, that the Association had been relying economically on that coverage to expand its assessment base since 1987, and that the legislature (while amending the Act in other respects) had left that judicially confirmed coverage in place until 1992.

Judges Loken and Bowman concurred in the result, but only after concluding (along with five other judges, *see id* at 26a-28a) that the Amendment did substantially impair contractual obligations. *Id.* at 19a-26a. They explained that the Association's guaranty obligation triggered by the Executive Life insolvency, and the annuities themselves, were contractual obligations to the Trustee as contract owner (*id.* at 20a-21a) and that the Amendment's effect on the Trustee's claim (extinguishing it and substituting payment to only 25% of the plan participants) was anything but "incidental to another legislative purpose; the statute was enacted to impair" (*id.* at 21a). Judges Loken and Bowman concluded, however, that this substantial impairment was constitutionally justified as a reasonable

correction of a "substantial unforeseen consequence" of the Act (*id.* at 24a), as the majority concluded (in reliance on *Carlton*) with respect to the due process claim.

Judge Richard S. Arnold, joined by four other judges, dissented on the Contract Clause. *Id.* at 26a-31a. Like Judges Loken and Bowman, the dissenters concluded that the Amendment substantially impaired the obligations on petitioners' contracts with Executive Life, and with the Association upon the guarantee-triggering insolvency. *Id.* at 26a-28a. The dissenters then explained that the State lacked constitutionally sufficient justification for the impairment. In particular, it rejected the critical assertion of "unforeseen consequences or windfall benefits," because the Minnesota Act's coverage of resident trustees' unallocated annuities was "not only foreseeable, but readily ascertainable" based on the unambiguous text of the statute and the 1987 *Minnesota Life* decision. *Id.* at 28a-29a. The dissenters concluded that the Amendment violated the historical, core principle of the Contract Clause barring a State from retroactively extinguishing fully ripened obligations to pay money. *Id.* at 29a-31a.

REASONS FOR GRANTING THE PETITION

The Minnesota legislature, seeking to free up funds for payment to its own residents, enacted expressly retroactive legislation to cancel the Association's unambiguous, outstanding obligation on annuity contracts owned by petitioner Trustee. The *en banc* court of appeals, though in considerable disarray about the rationale and divided 7-5 on the result, held this overt extinguishment of a matured debt to be constitutional, relying on the legitimacy of the State's purpose of protecting state residents' economic interests and its characterization of the debt-cancelling law as "curative." The court's ruling warrants review because it presents important questions about the survival of long-standing, vital limits on governmental power to terminate obligations (properly held to be contractual by a majority of the Eighth Circuit) that were clear and binding under prior law.

The Eighth Circuit's upholding of the Minnesota statute rests on a fundamental, and dangerous, misunderstanding of recent constitutional doctrine. Of course, many decisions of this Court, under the Contract Clause and the Due Process Clause, recognize flexibility in legislative power to make various retroactive adjustments in economic interests. But amidst those decisions, this Court has never abandoned the constitutional principle that sharply curtails a State's authority simply to deprive private parties of their established rights to payment, whether from the State itself or from private parties. *See, e.g., Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). The Eighth Circuit ruling strikes at the remaining core of constitutional protection.

The Eighth Circuit justified its decision by repeatedly stressing that a State has a legitimate interest in assuring the protection of its own residents in the event of an insolvency. But the legitimacy of the State's ends is only half the inquiry. The remaining issue—and the critical one in this case—is whether a State may raise the funding for this goal by the means of stripping a narrow class (here, in fact, a single Trustee) of its clear right to payment under prior law. In holding that it may, the Eighth Circuit has improperly set aside the fundamental constitutional principle that limits a State's ability to impose public burdens on a narrow class of private parties who are not themselves responsible for the plight of the class benefited by the legislation. This essential principle, just as it forbids a State to dishonor its own obligations in order to pursue the valid goal of conserving money for its citizens (*United States Trust Co.*), likewise must forbid a State to excuse third parties from their debts in order to divert funds for the same purpose.

The Eighth Circuit also tried to justify the 1992 Amendment as merely "curative," but that rationale likewise warrants review. By so characterizing the law, the Eighth Circuit engaged in just the sort of limitless expansion of

that term that Justice O'Connor warned against in *Carlton*, 512 U.S. at 36 (concurring opinion), which involved an immediate legislative correction of an obviously unintended tax result (under language not authoritatively construed by this Court actually to require that result). In this case, by contrast, the State abrogated a payment obligation that, according to two authoritative judicial decisions, was unambiguous under prior law; the legislature left the obligation in place for five years after it was judicially confirmed; and the Association itself took advantage of that judicial construction for that entire period. This Court should rein in the Eighth Circuit's misuse of the *Carlton* principle.

Finally, the Eighth Circuit's treatment of this Court's decision in *Coombes v. Getz*, 285 U.S. 434 (1932), along with related cases such as *Ettor v. City of Tacoma*, 228 U.S. 148 (1913), merits review. The Eighth Circuit did not seriously question that *Coombes*, decided under both the Contract Clause and the Due Process Clause, is closely on point and condemned legislation very similar to the Minnesota legislation at issue here. Nevertheless, a majority declined to follow the principles of *Coombes* for due process purposes, deeming them of questionable current validity; and five of the judges refused to find a contract protected by the Contract Clause with only the weakest bow in the direction of *Coombes* on essentially indistinguishable facts. This Court has made clear, however, that a lower court may not disregard a Supreme Court precedent as if it had been overruled. *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484-85 (1989). It is the responsibility of this Court alone to consider whether a precedent should be disregarded as out of step with more recent doctrine. In fact, *Coombes* and its predecessors remain good law in prohibiting an outright extinguishment of a matured obligation to pay money.

A. THE EIGHTH CIRCUIT IMPROPERLY UPHELD AN OUTRIGHT RETROACTIVE ABROGATION OF AN OBLIGATION TO PAY A DEBT AS A MEANS OF FREEING UP MONEY FOR OTHERS

The Eighth Circuit concluded that, under modern Contract Clause and Due Process doctrine, though the Association was fully obligated to reimburse the Trustee prior to the Amendment, Minnesota had wide latitude to cancel those obligations in pursuit of a valid public purpose and that, here, the State was validly undertaking to assist resident beneficiaries not protected by the pre-Amendment statute. But this analysis, even taken on its own terms, is incompatible with both the history of the constitutional doctrines and their proper application. Consistent with the Court's recent reminder that property rights are not a "poor relation" of other constitutional rights (*Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994)), this Court has never held, or even suggested, that States enjoy a broad freedom directly to extinguish debts owed by themselves or by private parties.

1. From the beginning, the Constitution has embodied a steadfast principle: that state governments are *not* generally free to cancel either their own debts or those of private parties. The Contract Clause was specifically drafted to put a halt to "legislative schemes for the defeat of creditors and the invasion of contractual obligations." *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 427 (1934). As Chief Justice Marshall observed in *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 354 (1827) (dissenting opinion), it had become common practice for state legislatures in the late 18th Century to abuse "[t]he power of changing the relative situation of debtor and creditor, of interfering with contracts." This Court stated a decade ago that the "primary focus [of the Contract Clause] was upon legislation that was designed to repudiate or adjust pre-existing debtor-creditor relationships that obligors were unable to satisfy." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470,

503 (1987). *See* 2 R. Rotunda & J. Nowak, *Treatise on Constitutional Law* § 15.8, at 437 (1992) ("[t]he framers drafted the contract clause to prevent the states from enacting debtor relief laws").

Although the attention paid the Contract Clause has varied over the course of our constitutional history (*see id.* at 437-56), the Clause repeatedly and consistently has been applied to achieve its central purpose: to prevent States from cancelling their own debts or the debts of private parties. *See, e.g., Coombes* (discussed *infra*); *Hawthorne v. Calef*, 69 U.S. (2 Wall.) 10 (1865); *Bronson v. Kinzie*, 42 U.S. (1 How.) 311 (1843); *Sturges v. Crowinshield*, 17 U.S. (4 Wheat.) 122 (1819). The landmark 1934 decision of this Court in *Blaisdell*, of course, allowed the States newly broadened powers to adjust the terms and conditions for payment of obligations. But the Court made plain almost immediately that this expanded power, while permitting limited measures such as moratoria on payments or foreclosures that nonetheless protected obligees, stopped well short of the power to cancel obligations outright. *See W. B. Worthen Co. v. Thomas*, 292 U.S. 426 (1934) (unanimous, per Hughes, C.J.); *W. B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935) (unanimous, per Cardozo, J.).

Forty years later, the Court similarly invoked the Contract Clause to bar an attempt by New Jersey to change retroactively its obligations to bondholders, noting that "the Contract Clause limits the power of the States to modify their own contracts as well as to regulate those between private parties." *United States Trust Co.*, 431 U.S. at 17. And in *Allied Structural Steel*, the Court barred a narrowly focused imposition of additional duties on parties to a contract, expressly rejecting the dissent's notion that "the Clause forbids only state laws that diminish the duties of a contractual obligor and not laws that increase them." 438 U.S. at 244 n.16. While divided on how broadly the Contract Clause should be read, the Court was unanimous in concluding that the Clause still

served its historical purpose of limiting the power of States simply to relieve private parties of their preexisting obligations. *See id.* at 242-44; *id.* at 256-57 (Brennan, J., dissenting).

This long line of decisions thus establish a critical guide to the meaning of the prevailing Contract Clause standards. It is now accepted doctrine that impairments sometimes are constitutional, but only if "the adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption," and "[t]he severity of the impairment [will] increase the level of scrutiny to which the legislation will be subjected." *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 412, 411 (1983) (internal quotation marks omitted); *see Keystone*, 480 U.S. at 504-05. No matter how noble the purpose, however, this Court has yet to hold that extinguishing plain debts to free up money to make available to others, without conditions protecting the obligees, is a "reasonable" and "appropriate" *means* to serve the purpose.

2. The Due Process Clause, likewise, has imposed significant limits on the ability of States to extinguish existing rights to payment of matured obligations. In *Steamship Co. v. Joliffe*, 69 U.S. (2 Wall.) 450 (1864), the Court, speaking both in terms of contracts and of rights to payment generally, stated: "When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement." Similarly, the Court in *Ettor*, 228 U.S. at 156, stressed that a right to payment for damage to property, "fixed by the law in force when their property was damaged for public purposes, . . . cannot be defeated by subsequent legislation." By the early 1930s, the Court had established a "general rule that it is not consistent with due process to take away from a private party [by subsequent legislative action] a right to

recover the amount that is due when the act is passed." *Graham v. Goodcell*, 282 U.S. 409, 426 (1931); *see Coombes*, discussed *infra*; *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338, 339 (1922); *see also Perry v. United States*, 294 U.S. 330 (1935); *Lynch v. United States*, 292 U.S. 571 (1934).

These limitations, too, retain their vitality. Last Term, it was reconfirmed that sovereigns have " 'the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights.' " *United States v. Winstar Corp.*, 116 S. Ct. 2432, 2459 n.28 (1996) (lead opinion). While the Court has recognized that the Due Process Clause, like the Contract Clause, does not prevent sovereigns from limiting certain obligations in order to serve an overriding public interest, *id.* at 2465, it has nonetheless demanded careful inquiry in instances where a government seeks to nullify obligations in pursuit of its "self-interest," *i.e.*, "instances in which the Government seeks to shift the costs of meeting its legitimate public responsibilities to private parties." *Id.* Thus, in determining whether " '[t]he retroactive aspects of [economic] legislation . . . meet the test of due process': a legitimate legislative purpose furthered by rational means" (*General Motors Corp.*, 503 U.S. at 191 (quoting *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 730 (1984))), it is necessary, as it is under the Contract Clause, to examine whether the legislation simply goes too far in imposing on private entities burdens that in all fairness should be borne by the public. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960).

3. The Eighth Circuit, while purporting to apply modern standards, actually misapplied them, granting far too much leeway for States to fund desired programs by means of cancelling outstanding obligations. The 1992 Amendment is, at bottom, nothing more than a mechanism by which funds owed to the Trustee were requisitioned to pay for previously unguaranteed benefits to Minnesota residents. Rather than electing to provide coverage for

resident beneficiaries out of general revenues, or by an increased assessment of Association members, the State chose instead to put the burden of providing for those beneficiaries on the Trustee (and its non-resident beneficiaries), using the device of eliminating most of the obligations previously assumed by the Association. Yet the majority below concluded that this legislative shifting of funds—rendered, after the fact, against a single creditor —could be justified by the State interest in providing for its own residents.

Whether judged under the standards of the Contract Clause or the Due Process Clause, this theory proves too much. If a State may relieve the Association of its obligation to pay funds owed to the Trustee, in an effort to free up funds for payment to residents instead, it is not apparent why a State may not likewise release itself from an obligation to pay debts to its creditors, on the ground that it wishes to conserve its resources for its residents. The diversion of funds to its own citizens is obviously a rational objective, viewed solely in terms of the State's own interest. But this Court has made very clear that reliance on this sort of self-defining interest—avoiding payment of obligations so that additional funds are then available for public use—is *not* an adequate justification under the Contract Clause, pointing out that "[a] governmental entity can always find a use for extra money, especially when taxes do not have to be raised." *United States Trust Co.*, 431 U.S. at 26. Indeed, the Court has explained: "If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." *Id.*

A State, of course, has a legitimate interest in providing aid to its own citizens. But this Court has never held that this interest, standing alone, justifies resort to the extraordinary means of retroactively cancelling obligations, whether public or private, in order to raise the funds to do so. And it would be particularly out of place to allow

that shifting of burden here, given that the legislation, insofar as it is retroactive, applies *only* to petitioner Trustee. This Court has noted that the targeting of legislation at a small class of private parties—singling them out for unique burdens—requires especially close scrutiny of claims that the law is necessary to achieve legitimate public ends. *See Allied Structural Steel*, 438 U.S. at 250 (striking down a law placing retroactive obligations on a small number of Minnesota employers, pointing out that "its narrow aim was leveled, not at every Minnesota employer, not even at every Minnesota employer who left the State, but only at those who had in the past been sufficiently enlightened as voluntarily to agree to establish pension plans for their employees"); *see also Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1249 (3d Cir.), *cert. denied*, 484 U.S. 963 (1987) ("[l]egislation aimed retroactively to benefit or burden a few identifiable persons is particularly vulnerable to the charge that it is not reasonably related to the asserted public purposes"). The 1992 Amendment adopts an improper means of serving a legitimate end, "forcing some people alone to bear public burdens which . . . should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49.

This same reasoning properly informs due process analysis as well. Even under the familiar rational basis standard, it would be anomalous to hold that a State may forgive its own debts, or the debts of private parties, on the unvarnished ground that it would prefer to see the funds diverted to other purposes. This Court has, of course, upheld retroactive legislation that places burdens on employers for the benefit of employees who suffered the harm addressed by the law in the course of their employment. *See, e.g., Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); *R.A. Gray & Co., supra; Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993). But no comparable basis in causal responsibility is present in

this case: there is no claim whatsoever that the Trustee—or the non-resident beneficiaries, a class of non-voters on whom the burden of providing for resident beneficiaries has now effectively been placed (*see* Pet. App. 31a (Richard S. Arnold, C.J., dissenting))—are in any way responsible for the prior lack of coverage for the newly benefited group. Without such a nexus, the power to readjust the benefits and burdens of economic life does not reach this far: it does not encompass the retroactive cancellation of obligations for the simple purpose of putting the money to use, even good use, in other ways. *See Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 229 (1986) (O'Connor, J., concurring) (stressing critical importance, in upholding retroactive imposition on employers, of premise that their conduct was responsible for the employee harm addressed by the new imposition). As the Court has said in a related context, " '[a] strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.' " *Dolan*, 512 U.S. at 396 (quoting *Pennsylvania Coal Co. v. Mahan*, 260 U.S. 393, 416 (1922)).

B. THE EIGHTH CIRCUIT IMPROPERLY JUSTIFIED THE IMPAIRMENT AS "CURATIVE"

The Eighth Circuit, in addition to relying on the public purpose of aiding residents, justified cancellation of the Association's obligations to the Trustee on the ground that the legislation was "curative" in nature. It thus suggested that the Amendment was akin to laws like the prompt repeal of an obviously unintended income-tax benefit at issue in *Carlton*. This reliance on the "curative" characterization illustrates the very danger stressed by Justice O'Connor in *Carlton*: virtually *all* repealing legislation is curative in a general sense, reflecting dissatisfaction with the consequences of the repealed law. 512 U.S. at 36 (concurring opinion). As a defense of obligation-cancelling legislation, the "curative" label, or the notion

of "unintended windfall," loses all meaning if it is stretched to cover this case.[9]

First, prior law was "unambiguous"—as the Minnesota Court of Appeals held in 1987 and the Supreme Court of Minnesota reiterated in 1994. *See* pages 6, 10-11, *supra*; Pet. App. 75a, 76a ("resident trustees who own unallocated annuity contracts are unambiguously entitled to coverage under the terms of the Act prior to the Amendment"; resident contract owners are "plainly entitled to coverage").[10] Thus, the state supreme court specifically rejected the Association's contention that this construction would lead to "an unintended windfall for non-resident employees who are participants in pension plans with a Minnesota trustee." *Id.* Second, after this clear coverage was judicially confirmed in 1987, the Minnesota legislature—unlike the Congress in *Carlton*—did not take prompt action to "correct" the result. Rather, despite amending the Act in other respects, the legislature left this coverage in place for five years—until the 1992 Amendment. Third (and consistent with the absence of any prompt alteration of the Act), the Association itself took advantage of the coverage of unallocated annuity con-

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[9] The Contract Clause decision relied on for this principle by Judges Loken and Bowman (Pet. App. 23a), *i.e.*, *El Paso v. Simmons*, 379 U.S. 497 (1965) (*see United States Trust Co.*, 431 U.S. at 21; *Energy Reserves*, 459 U.S. at 412), involved nothing like an outright abrogation of a debt. In *El Paso*, a State's sale of public land provided that, if the buyer should ever default on a long-term series of payments, the land would revert to the State, subject to reinstatement whenever the amounts due were paid, unless a third party had not acquired the land in the meantime. Forty years later, to achieve certainty in land ownership, the State set a five-year limit on this reinstatement right. In a case involving a plaintiff whose default occurred years *after* the new five-year period was enacted—so that he had ample notice of the available period of reinstatement—the Court held that this new limitations period was valid.

[10] In *Carlton*, the Court did not give an authoritative construction of the repealed income-tax provision, stating only that "the reading of the original statute on which [the respondent] relied appears to have been correct." 512 U.S. at 33.

tracts owned by resident trustees, which greatly increased its assessment base, as the state supreme court stressed. Pet. App. 77a.

The decisions of the Minnesota courts thus establish that, for years, the Association was unmistakably aware of and benefited from the Act's judicially confirmed, unambiguous coverage of its obligations to trustees. The legislature left that coverage in place. The late-in-the-day 1992 Amendment is a *post hoc* renunciation that is not the sort of "curative" action that merits exceptional deference under the Contract Clause or the Due Process Clause.

C. THE EIGHTH CIRCUIT IMPROPERLY DECLINED TO FOLLOW *COOMBES v. GETZ* AND ITS PREDECESSORS

1. In *Coombes v. Getz*, building on prior decisions, this Court applied both the Contract Clause and the Due Process Clause to strike down legislation in a situation strikingly similar to this one. The Court held that a creditor of a corporation was able to collect its debt from a director of that corporation—pursuant to a state constitutional provision making directors liable to creditors for any funds embezzled or misappropriated by officers of the corporation—even though the law had subsequently been repealed. Although the state supreme court had found that liability of the director had terminated upon repeal of the provision, this Court flatly rejected that analysis, stating that "neither vested property rights nor the obligation of contracts of third persons may be destroyed or impaired." 285 U.S. at 442. The Court then concluded that, by virtue of the constitutional provision making the directors liable to creditors, "a contractual obligation arose; and the right to enforce it, having become vested, comes within the protection of both the contract impairment clause in article 1, § 10, and the due process of law clause in the Fourteenth Amendment, of the federal Constitution." 285 U.S. at 448. As a result

of that protection, the later repeal of the provision was ineffective to destroy the obligation that previously existed.

The situation here is fundamentally the same. By statute Minnesota established an interlocking system of rights and responsibilities, by which the Association "guarantee[d]" and "assume[d]" the obligations of insurance companies and, in turn, levied assessments against insurance companies based on such obligations. Like the obligation at issue in *Coombes*, the obligation owed to the Trustee plainly fell within the terms of the prior law and, but for the subsequent legislation cancelling it, was a binding debt of the Association. Thus, if the principles set forth in *Coombes* and its predecessors remain good law, the subsequent legislation could not be held to deprive the Trustee of its right to payment.

2. Not only is the Eighth Circuit's judgment inconsistent with *Coombes*, but a majority of the Eighth Circuit specifically rejected *Coombes* and its precursors as due process precedents, deeming them no longer valid (and the two concurring judges then ignored *Coombes* on the issue of justifying the acknowledged substantial impairment under the Contract Clause). That treatment gives too little stature to decisions of this Court. The Court has stated pointedly that, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez De Quijas*, 490 U.S. at 484-85; *see Agostini v. Felton*, No. 96-552 (June 23, 1997), slip op. 31-32. This Court has never overruled *Coombes* or the decisions it followed.

The judges below were also incorrect in believing that the *Coombes* line of authority is out of keeping with modern constitutional doctrines. As shown in Parts A and B, *supra*, this Court, while approving various retro-

active "adjustments" of economic interests, has never abandoned the fundamental principle that a naked elimination of an unambiguous debt simply goes too far. The "severity" of such an imposition on private parties (*see Keystone*, 480 U.S. at 504 n.31; *Energy Reserves*, 459 U.S. at 411) makes it an unreasonable means of serving a public purpose. And that is so regardless of whether the governing standard is derived from the Contract Clause or the Due Process Clause.

3. The five judges of the Eighth Circuit who found no contract subject to Contract Clause protection (Pet. App. 7a-10a) also paid inadequate respect to *Coombes*—as a majority of the Eighth Circuit judges concluded in finding that contract rights were indeed impaired. The five minority judges did no more than make a passing "*Cf.*" reference to *Coombes*, stating that the annuities here were not "created in pursuance of the statutory obligation." *Id.* at 10a. But in *Coombes*, the corporation's debts to third parties that were protected by the director liability (prior to its repeal) likewise were not created pursuant to the state-law provision establishing that liability. Nevertheless, the Court in *Coombes* held that, upon the event triggering the liability to the corporation's creditors, the directors assumed a contractual obligation that "acquired an independent existence competent to survive the destruction of the provision which gave it birth." 285 U.S. at 442. *Coombes* cannot fairly be distinguished on this point.

At the root of the error committed by the five minority judges on this issue was their mistaken assumption that "statutory" rights and "contractual" rights are mutually exclusive categories. *See* Pet. App. 10a ("[w]e conclude that the Association's obligations are statutory in nature rather than contractual"). That is simply wrong. *See Coombes, supra; Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938); *United States Trust Co., supra. See also Nieves*, 819 F.2d at 1243-48. While not all statutory

obligations are regarded as contractual ones, the law here unequivocally imposed substantive obligations on the Association to, *inter alia*, "guarantee, assume or reinsure . . . the covered policies of residents"—purchased from insurers competing in the financial marketplace—and directed the Association to "make or cause to be made prompt payments of the impaired insurer's *contractual obligations* which are due and owing to residents." Act § 61B.06 subd. 2 (emphasis added). The majority correctly concluded that the provisions were more than mere statutory declarations of policy, free to be altered without regard to the Contract Clause.[11] Accordingly, the 1992 Amendment's impairment of petitioners' contracts were subject to Contract Clause standards—which, as we have argued, prohibit this impairment: although the State may come to the aid of its residents, it may not get the resources to do so by cancelling the obligations owed to private parties under prior law.

* * * *

The decision below, if allowed to stand, would do what this Court has never done: establish a broad power for state governments to cancel outstanding obligations in order to finance other projects. Although this Court over time has relaxed the strictest limitations of the Contract Clause and Due Process Clause, it has nevertheless continued to apply both provisions to protect the essential right of creditors to have their obligations redeemed. The court of appeals was plainly aware of that tradition, but it

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[11] Although the Minnesota Supreme Court, for its part, relied on the fact that "[t]he Association's statutory obligations are not coextensive with the contractual obligations of a failed insurer" (Pet. App. 79a), that observation seems to mix together two separate concepts: whether there is a contractual obligation and what the extent of that contractual obligation might be. A guarantor may elect not to guarantee the entire obligation owing to a particular creditor, but that decision does not mean that it is any less responsible for the obligation that it does assume.

ultimately determined that it should be honored more in the breach, than in the observance. That departure—contrary to precedent and misguided in theory—warrants further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 27, 1997

APPENDIX A

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 95-1754

HONEYWELL, INC.; HONEYWELL PENSION and RETIREMENT COMMITTEE, on their own behalf and on behalf of the Honeywell Retirement Investment Plan; INVESTMENT PLUS PLAN OF HONEYWELL, INC.; HONEYWELL RETIREMENT SAVINGS PLAN; FIRST TRUST NATIONAL ASSOCIATION,

Plaintiffs-Appellants,

v.

MINNESOTA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION,

Defendant-Appellee.

Submitted Oct. 22, 1996

Decided April 2, 1997

Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD, and MURPHY, Circuit Judges, en banc.

HANSEN, Circuit Judge.

The plaintiffs (collectively referred to as Honeywell) appeal the district court's [1] grant of summary judgment for

[1] The Honorable Richard H. Kyle, United States District Judge for the District of Minnesota.

the defendant, Minnesota Life and Health Insurance Guaranty Association (the Association), in this declaratory judgment suit. At issue is whether an amendment to a Minnesota statute, which amendment applies retroactively, violates either the Contract Clause or the Due Process Clause of the Constitution of the United States. The district court granted the Association's motion for summary judgment and dismissed Honeywell's complaint, concluding that the amendment passes constitutional muster.

A panel of this court unanimously affirmed the judgment of the district court. *Honeywell v. Minnesota Life & Health Ins. Guaranty Assoc.*, 86 F.3d 766 (1996). Honeywell requested en banc review. We granted this request, vacated the panel's opinion on August 27, 1996, and heard the case en banc. We now affirm the judgment of the district court.

I. BACKGROUND

Honeywell, Inc. is a Delaware corporation with its principal place of business in Minnesota. Honeywell sponsors certain defined contribution benefit and retirement plans for its employees. These plans include the Honeywell Retirement Investment Plan, the Investment Plus Plan of Honeywell Inc., and the Honeywell Retirement Savings Plan. The current trustee of the Honeywell plans is First Trust National Association, which has its principal place of business in Minnesota.

The Association is a nonprofit Minnesota corporation created pursuant to the Minnesota Life and Health Insurance Guaranty Association Act (the Act), Minn.Stat.Ann. §§ 61B.01-61B.16 (West 1986).[2] The Association exists

[2] This Act has been repealed and was replaced in 1993, with Minn. Stat.Ann. §§ 61B.18-61B.32, (West Supp.1996). The legislature provided, however, that §§ 61B.01-61B.16, as amended in 1992, remain applicable to the subject of this suit. *Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Assoc.*, 518 N.W.2d 557, 558 n. 4 (Minn.1994). The issue in this case deals with a 1992 amendment to the Act, and not the new 1993 version of the Act.

to protect the contractual rights of policy owners and beneficiaries of life insurance policies, health insurance policies, and annuity contracts (subject to certain definitions and limitations), when the insurer that issued the life insurance, health insurance, or annuity contract becomes financially unable to perform its obligations. *See* Minn. Stat.Ann. § 61B.02, subd. 2. *See also Minnesota Life & Health Ins. Guar. Assoc. v. Department of Commerce*, 400 N.W.2d 769, 770 (Minn.Ct.App.1987). To provide this protection, all insurance companies that deal in life, health, and annuity contracts and elect to do business in Minnesota are required to join and contribute to the Association. *Minnesota Life*, 400 N.W.2d at 770. The dispute in this case arose following the 1991 insolvency of an out-of-state member insurance company and the 1992 enactment by the Minnesota legislature of an amendment that retroactively redefines the term "contractual obligation" under the Act.

In 1988, the Honeywell plans' trustee, who was a Minnesota resident (as is the current trustee), invested in Guaranteed Investment Contracts (GICs) issued by Executive Life Insurance Company of California (ELIC), a member of the Association. GICs are unallocated annuity contracts, or annuity contracts "not issued to or owned by a named individual." *Id.* GICs are investments made by the trustee for the benefit of the plan participants and are considered covered policies under the Act. *See id.* at 775 (holding that GICs are covered annuities under Minn. Stat. § 61B.03, subd. 3 (1984)). The Honeywell GICs expressly name the Honeywell trustee as the policy owner, and not the individual plan participants for whom the investment was made. *Honeywell*, 518 N.W.2d at 561.

In 1991, ELIC became insolvent and unable to fulfill its contractual obligations on the Honeywell GICs, which amounted to $111,000,000. By letter dated January 10, 1992, the Honeywell trustee, as the resident policy owner, submitted to the Association a claim for guaranty cover-

age under the Act. Honeywell sought coverage for ELIC's entire obligation to the Honeywell trustee, which would inure not only to the benefit of Honeywell's 9,000 Minnesota resident plan participants but also to Honeywell's 27,000 nonresident plan participants.

The Association neither granted nor denied Honeywell's claim initially. ELIC's insolvency had also affected approximately 10,000 other Minnesota residents who were employed in Minnesota by other companies whose plan trustees owned GICs but which trustees were *not* Minnesota residents. At that time, the Act required the Association to guarantee the covered policies of "residents" to whom any "contractual obligation" was owed from an out-of-state insurer. Minn.Stat.Ann. § 61B.06, subd. 2 (West 1986). *See Honeywell*, 518 N.W.2d at 558. The term "resident," defined as "any person who resides in this state at the time the impairment is determined and to whom contractual obligations are owed," Minn.Stat.Ann. § 61B.03, subd. 13 (West 1986), was broad enough to include a trustee who resided in Minnesota. *Honeywell*, 518 N.W.2d at 560-61. The term "contractual obligation," defined as "any obligation under covered policies," Minn.Stat.Ann. § 61B.03, subd. 5 (West 1986), was broad enough to include a GIC obligation owed to a resident trustee. *Honeywell*, 518 N.W.2d at 560-61. Thus, as then codified, the Act, combined with ELIC's insolvency, created the potential that all the Honeywell plan participants, thousands of whom were not residents of Minnesota, might be entitled to coverage under the Minnesota Act because their plan trustee happened to be a Minnesota resident. Whereas, many other Minnesota non-Honeywell employed resident plan participants, who worked for companies whose plan trustee resided in a different state, might not be entitled to any coverage because their trustee (the one to whom the contractual obligation was owed) was not a Minnesota resident.

Faced with this dilemma, on January 21, 1992, the Minnesota Department of Commerce (which supervises

and regulates the Association and to whom appeals may be taken from the Association's determinations, *see* Minn. Stat.Ann. § 61B.09(c)), issued an opinion, advising the Association chairman on the coverage problems created by the ELIC insolvency:

> The Department believes it is the clear intent of the Act to cover the people of Minnesota. Accordingly, it is the Department's position that the Guaranty Association Act provides coverage to Minnesota resident employees who are the beneficiaries of defined-contribution pension plans funded by Guaranteed Investment Contracts purchased from Executive Life.
>
> Consistent with that position the Department has determined that non-resident employees of such a plan, regardless of the residency of the trustee or plan sponsor, are not covered under the Act.

(Appellee's App. at GA-59.)

Subsequently, on April 27, 1992, the governor signed into law an amendment to the definition of the term "contractual obligation," in a purported attempt to retroactively "clarify" the statutory coverage in a manner consistent with the Department of Commerce opinion. *Honeywell*, 518 N.W.2d at 562. The 1992 amendment, which specifically applies retroactively, narrowed the definition of "contractual obligation" to specifically *exclude* any obligation owed "to nonresident participants of a covered plan or to the plan sponsor, employer, trustee, or other party who owns the contract; in such cases, the association is obligated under this chapter only to participants in a covered plan who are residents of the state of Minnesota on the date of impairment." 1992 Minn.Laws, ch. 540. Thus, the amendment expressly provides coverage only to plan participants who are Minnesota residents. In light of the opinion of the Department of Commerce and the retroactive 1992 amendment, the Association took the position that its guaranty obligation to Honeywell covers

only those Honeywell plan participants who resided in Minnesota when ELIC became insolvent.

Honeywell then brought an action for declaratory and injunctive relief and monetary damages in Minnesota state court based on the Association's refusal to fully guaranty the whole of the trustee's claim. Honeywell sought a declaration that retroactive application of the 1992 amendment violates both the Contract Clause and the Due Process Clause of the Constitution because Honeywell's entitlement to coverage and payment under the prior statute had fully accrued before the enactment of the 1992 amendment. The Association removed the case to federal district court pursuant to 28 U.S.C. § 1441.

After removal, the parties filed cross motions for summary judgment. The district court ruled in favor of Honeywell, holding that the retroactive abrogation of Honeywell's guaranty coverage rights impermissibly destroyed vested rights in violation of both the Contract Clause and the Due Process Clause of the Constitution. After the Association moved for reconsideration, however, the district court vacated its initial opinion and certified two questions to the Supreme Court of Minnesota: (1) Did the 1992 amendment to the Act's definition of "contractual obligation" effect a substantive change in the Association's obligations or merely clarify existing obligations? (2) Is the annuity contract owner's (the trustee's) right to guaranty payment from the Association a purely statutory right or is it contractual in nature? The Supreme Court of Minnesota ruled on the certified questions, holding that (1) the 1992 amendment to the definition of "contractual obligation" substantively changed the Association's coverage obligations, and (2) the right to payment from the Association is a purely statutory right under state law. *See Honeywell*, 518 N.W.2d at 563.

After the Supreme Court of Minnesota responded to the certified questions, the parties again filed cross motions for summary judgment. This time, the district court granted the Association's motion for summary judgment,

concluding that retroactive application of the 1992 amendment did not violate either the Contract Clause or the Due Process Clause, and dismissed Honeywell's complaint with prejudice. Honeywell appeals.

II. DISCUSSION

Honeywell contends that its preamendment right to insurance guaranty coverage is contractual in nature and that retroactive application of the amendment constitutes the impairment of its contractual rights in violation of the Contract Clause. Honeywell also argues that the 1992 amendment arbitrarily and irrationally destroyed its accrued, vested right to guaranty coverage, in violation of the Due Process Clause. We begin our analysis with the Contract Clause.

A. CONTRACT CLAUSE

The Constitution provides, "No State shall . . . pass any Law impairing the Obligation of Contracts. . . ." U.S. CONST. art. I, § 10, cl. 1. Read literally, this constitutional prohibition bans any interference with contracts, but cases interpreting the clause clearly indicate that this prohibition "is not an absolute one and is not to be read with literal exactness like a mathematical formula." *Home Bldg. & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 428, 54 S.Ct. 231, 236, 78 L.Ed. 413 (1934). Instead, when a litigant contends that a legislative amendment has impermissibly impaired contractual obligations, our inquiry initially focuses on "whether the change in state law has 'operated as a substantial impairment of a contractual relationship.' " *General Motors Corp. v. Romein,* 503 U.S. 181, 186, 112 S.Ct. 1105, 1109, 117 L.Ed.2d 328 (1992) (quoting *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 244, 98 S.Ct. 2716, 2722, 57 L.Ed.2d 727 (1978)) (other citation omitted). Three basic components are essential to this inquiry: (1) Does a contractual relationship exist, (2) does the change in the law impair that contractual relationship, and if so, (3) is the impairment

substantial? *Id.* If we conclude that a substantial impairment of a contractual relationship exists, we must then carefully examine "the nature and purpose of the state legislation." *Allied Structural Steel Co.*, 438 U.S. at 244, 98 S.Ct. at 2722.

We first consider whether a contractual relationship exists. In this case, the district court certified to the state supreme court the question of whether the Association's guaranty obligation to GIC owners, such as the Honeywell trustee, is a contractual or a statutory obligation. The Supreme Court of Minnesota determined that the right to payment from the Association is a purely statutory right under *state* law. *Honeywell,* 518 N.W.2d at 563. Honeywell first contends that the district court erroneously certified a question of federal constitutional law to the state court.

While federal courts "accord respectful consideration and great weight to the views of the State's highest court," the determination of whether the Act created a contractual obligation 'is a federal question for purposes of Contract Clause analysis, and whether it turns on issues of general or purely local law, we can not surrender the duty to exercise our own judgment." *Romein,* 503 U.S. at 187, 112 S.Ct. at 1110 (internal quotations omitted). Contrary to Honeywell's assertion, however, the district court did not avoid its duty to determine the constitutional issue by certifying a question to the state supreme court. Instead, the district court gave proper consideration to the state court's views but independently determined that the right to payment under the Act is not contractual within the meaning of the Contract Clause. We review de novo the district court's judgment on this constitutional question. *See United States v. Bates,* 77 F.3d 1101, 1104 (8th Cir.), *cert. denied,* —— U.S. ——, 117 S.Ct. 215, 136 L.Ed.2d 149 (1996).

Our independent review leads us to agree with the district court that the rights at issue are statutory in nature

and therefore, no contractual relationship existed between Honeywell and the Association. Two factors lead us to this conclusion: (1) the Act itself does not create a contract, and (2) the GICs do not specifically incorporate the terms of the Act.

First, the Act's guaranty is not itself a contract between the Association and those who qualify for the Act's protection. "In general, a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n. 14, 97 S.Ct. 1505, 1516, 52 L.Ed.2d 92 (1977). The right to payment under the Act is not enforceable against the state of Minnesota but is an obligation imposed upon the Association. The Association is a nonprofit legal entity and not a state agency. Minn.Stat.Ann. § 61B.04, subd. 1 (West 1986). *See also* Minn.Stat.Ann. § 61B.21, subd. 1 (West Supp.1996). Even if the Association were a state agency, the Act contains no "clear indication that the legislature intends to bind itself contractually," which is necessary in order to overcome the general presumption "that a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 465-66, 105 S.Ct. 1441, 1451, 84 L.Ed.2d 432 (1985) (quotations omitted). Rather, the Act creates an insurance guaranty association with attendant statutory obligations to safeguard the financial well-being of Minnesota residents to whom contractual obligations are owed by its member insurance companies. The Act does not create a contract; instead, it creates a statutory safety net to protect the economic well-being of Minnesota resident policy owners in the event a member insurer becomes insolvent.

Second, while the Association has the power to enter into contracts, Minn.Stat.Ann. § 61B.06, subd. 9(a) (West 1986), the Association is not a party to the GICs

involved here. The GICs at issue are contracts between the Honeywell trustee and the impaired ELIC, not the Association. The Honeywell trustee did not specifically bargain for protection under the Act, and the Act is not expressly or impliedly incorporated into the terms of the GICs. For the most part, state laws are implied into private contracts regardless of the assent of the parties only when those laws affect the validity, construction, and enforcement of contracts. *Romein,* 503 U.S. at 189, 112 S.Ct. at 111. The Association's statutory obligation to guaranty the insurance coverage of residents protected by the Act does not in any way affect the validity, construction, or enforcement of ELIC's obligation on the GIC. Moreover, there is no evidence that the GICs were created in pursuance of the statutory obligation. *Cf. Coombes v. Getz,* 285 U.S. 434, 442, 448, 52 S.Ct. 435, 436, 438, 76 L.Ed. 866 (1932) (upholding the contractual liability created pursuant to a state constitutional rule of law that was repealed). The 1992 amendment merely altered definitions under the Act, which in turn affect the Association's statutory obligation to the Honeywell trustee, but the amendment did not alter or affect any bargained-for agreement between the Association and the Honeywell trustee. The Contract Clause does not "protect against all changes in legislation, regardless of the effect of those changes on bargained-for agreements." *Romein,* 503 U.S. at 190, 112 S.Ct. at 1107.

We conclude that the Association's obligations are statutory in nature rather than contractual. Absent the existence of a contractual relationship, our Contract Clause inquiry is finished. Accordingly, we affirm the district court's conclusion that the 1992 amendment did not unconstitutionally impair a contractual relationship in violation of the Contract Clause.

B. DUE PROCESS

Honeywell's due process claim presents a closer question. Honeywell argues that retroactive application of the

1992 amendment defeats its vested right to payment under the Act, in violation of the Due Process Clause. Honeywell relies on *Coombes*, 285 U.S. at 439-48, 52 S.Ct. at 437-38, where the Supreme Court held unconstitutional the repeal of a California state constitutional provision that provided a cause of action against corporate directors. The Court stated in absolute terms that "neither vested property rights nor the obligation of contracts of third persons may be destroyed or impaired." *Id.* at 442, 52 S.Ct. at 436. More specifically, the Court in *Coombes* held, "a contractual obligation arose; and the right to enforce it, having become vested, comes within the protection of both the contract impairment clause in Art. 1, § 10, and the due process of law clause in the Fourteenth Amendment, of the Federal Constitution." *Id.* at 448, 52 S.Ct. at 438. Honeywell also relies on *Ettor v. City of Tacoma*, 228 U.S. 148, 158, 33 S.Ct. 428, 431, 57 L.Ed. 773 (1913), where the Supreme Court held that a statutory right to compensation for property damage caused by the city in the course of grading streets, which right to compensation was complete before a repeal of the cause of action, was a vested property right that could not be retroactively destroyed. Claiming that these cases control the outcome of the case at hand, the Honeywell trustee asserts a vested right to payment under the Act as it existed when ELIC became insolvent, prior to the 1992 amendment.

The Association, on the other hand, urges us to follow more recent Supreme Court precedents in which the Court reviews economic legislation with a very deferential eye and does not accord vested rights status to economic rights. The Association observes that under this modern approach, due process is satisfied as long as a reasonable legislative purpose supports the retroactive application of the legislation. The Association contends that the retroactive 1992 amendment is supported by a reasonable legislative purpose, and alternatively, that no vested rights accrued in favor of the Honeywell trustee upon ELIC's insolvency.

In one sense, both arguments are right. The Supreme Court has never expressly overruled the reasoning of *Ettor* and *Coombes,* which accords great protection to accrued statutory causes of action. In the area of economic legislation, however, we cannot ignore the abundance of cases where substantive due process has evolved into a deferential rational basis analysis. We believe that an understanding of the historical context of *Ettor* and *Coombes* is essential to divine accurately the present weight of their authority on the issue before us. *See Hammond v. United States,* 786 F.2d 8, 11 (1st Cir.1986) (questioning the continued vitality of *Coombes* and *Ettor* because recent cases have retroactively abridged economic and real property rights without always carefully distinguishing these prior cases). *See also* W. David Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking,* 48 Cal.L.Rev. 216, 232 (1960) ("The decision [of *Coombes v. Getz*] seems far too rigid in its conception of permissible legislative change and would almost certainly not be followed today.").

Ettor and *Coombes* were decided during what is referred to in the history of American jurisprudence as the *Lochner* era, named for the pivotal case of judicial activism, *Lochner v. New York,* 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (invalidating maximum work hours legislation as an unconstitutional exercise of police power). Cases of that era frequently invalidated statutes that limited economic autonomy in a manner thought by the Court to be unnecessary or unwise, but in more recent decisions, the Court plainly sees its role differently: "[W]e do not sit as a super legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." *Day-Brite Lighting, Inc. v. Missouri,* 342 U.S. 421, 423, 72 S.Ct. 405, 407, 96 L.Ed. 469 (1952). The reasoning prevalent during the "*Lochner* [era] has been implicitly rejected many times." *Whalen v. Roe,* 429 U.S. 589, 597 & n. 18, 97 S.Ct. 869, 875, 51 L.Ed.2d 64 (1977). *See also United States v.*

Carlton, 512 U.S. 26, 31-34, 114 S.Ct. 2018, 2023-24, 129 L.Ed.2d 22 (1994) (recognizing that three tax cases from the *Lochner* era "were decided during an era characterized by exacting review of economic legislation under an approach that 'has long since been discarded' " (citation omitted)); *Planned Parenthood of S.E. Pa. v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674, 861 (1992) (recognizing that the demise of *Lochner* era reasoning began in *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937).

Within two years of the *Coombes* decision, substantive due process analysis in the area of retroactive economic legislation began to be framed in terms of reasonableness, drifting away from the *Lochner* era's strict protection of economic freedom and vested rights. *See Blaisdell,* 290 U.S. at 438, 54 S.Ct. at 240 (upholding as an emergency measure a mortgage moratorium law that impaired obligations on mortgage contracts). The Court acknowledged that even the expressly protected obligation of contracts (and similarly, we believe, the concept of vested rights) may be impaired by economic legislation if "the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end." *Id.* This rational basis substantive due process test appears to have supplanted the legislatively restrictive vested rights mode of analysis, and allows legislatures more freedom in dealing with economic situations. *See, e.g.,* James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights,* 79 Cornell L.Rev. 87, 119 (Nov.1993) ("Modern jurists reject the categorical logic of vesting and consider the statute's justifications under the rubric of substantive due process."); Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation,* 73 Harv.L.Rev. 692, 696-97 (1959-60) (noting that the vested rights analysis has been replaced by balancing three factors: (1) the nature and strength of the public interest served by the statute, (2) the extent to which the statute modifies or

abrogates a preenactment right, and (3) the nature of the right altered by the statute).

In 1976, the Court announced, "It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on the one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976). These authorities leave no doubt that, even though *Coombes* and *Ettor* have never been overruled by the Supreme Court, the modern framework for substantive due process analysis concerning economic legislation requires only an inquiry into whether the legislation is reasonably related to a legitimate governmental purpose. Given the criticism surrounding the Court's *Lochner* era decisions in general, coupled with the development of judicial deference to economic legislation since then, we join those who question the continued validity of the vested rights analysis of *Coombes* and *Ettor* when reviewing the constitutionality of economic legislation, recognizing as we must that only the Supreme Court itself can overrule its precedents. We rely instead on the more recent Supreme Court pronouncements of substantive due process analysis for economic legislation, which articulate a rational basis test.

Our task, then, is to determine whether the retroactive application of the 1992 amendment is justified by a rational legislative purpose, or whether it is illegitimate and arbitrary. Retroactive legislation, like prospective legislation, must meet the reasonableness test of due process. *Usery*, 428 U.S. at 17, 96 S.Ct. at 2893. "But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730, 104 S.Ct. 2709, 2718, 81 L.Ed.2d 601 (1984). Retroactive economic legislation has been upheld as reasonable even in circumstances where it de-

stroys a settled expectancy or imposes a new liability. *See, e.g., Carlton*, 512 U.S. at 30-31, 114 S.Ct. at 2022-23 (upholding a curative measure that took away an expected and relied upon deduction for estate tax); *Gray*, 467 U.S. at 734, 104 S.Ct. at 2720 (upholding retroactive application of ERISA's withdrawal liability as supported by rational legislative purpose); *Usery*, 428 U.S. at 19-20, 96 S.Ct. at 2894-95 (upholding retroactive aspects of Black Lung Benefits Act of 1972, which required employers to compensate former employees disabled by a work-related disease). The Court has repeatedly noted that although certain economic liabilities or burdens were not anticipated, nevertheless, " ' "our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." ' " *Concrete Pipe & Prod. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 637, 113 S.Ct. 2264, 2287, 124 L.Ed.2d 539 (1993) (quoting *Gray*, 467 U.S. at 729, 104 S.Ct. at 2717-18, quoting *Usery*, 428 U.S. at 16, 96 S.Ct. at 2892-93).

Using these standards, we conclude that the 1992 amendment redefining "contractual obligation" was neither arbitrary nor illegitimate. The state has a legitimate interest in regulating the insurance industry, easing the economic burdens of its own residents, and ensuring the economic life of an association created by its statute to protect its residents. The general purpose of the Act at issue in this case "is to protect the future financial stability of individuals," *Minnesota Life & Health Ins.*, 400 N.W.2d at 773, and the preamendment Act expressly provided protection to "residents" to whom "contractual obligations" are owed. Minn.Stat. § 61B.06, subd. 2 (1986). The 1992 amendment serves to narrow the definition of contractual obligation, explicitly providing coverage only to resident plan participants. This is a legitimate purpose.

The 1992 amendment is also curative in nature, even though it worked a substantive change in the law. *See Honeywell*, 518 N.W.2d at 560-63 (holding that the

amendment worked a substantive change in the law because before the amendment, it plainly entitled resident policy owners, including trustees, to coverage). Curative legislation corrects an unintended and unanticipated mistake in the underlying legislation, which went undetected until some time after the original enactment. Certainly, legislatures have the authority to cure inadvertent defects in their legislation. *See Carlton*, 512 U.S. at 30, 114 S.Ct. at 2022 (upholding Congress's attempt to cure, a defect in the tax code). In *Carlton*, the Court concluded that Congress's purpose in retroactively taking away an estate tax, deduction, even though the decendent's executor had relied upon it, was neither illegitimate nor arbitrary because "Congress acted to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss." 512 U.S. at 31, 114 S.Ct. at 2023. We also note the observation of one commentator that "the individual who claims that a vested right has arisen from the defect is seeking a windfall since, had the legislature's . . . action had the effect it was intended to and could have had, no such right would have arisen." Hochman, *supra* at 705.

Here, the Minnesota legislature acted reasonably when it gave retroactive effect to the 1992 amendment in order to cure a drafting defect that might have inadvertently left thousands of Minnesota residents without coverage under the Act due to the ELIC debacle. We agree with the observation of the Supreme Court of Minnesota: "Given that unallocated annuity contracts were not prevalent at the time of the statute's enactment in 1977, the legislature likely did not contemplate how the Act specifically applied to these contracts." *Honeywell*, 518 N.W.2d at 561. Absent retroactive effect, an unintended gap in coverage would have left many Minnesota resident workers (whose trustee resided elsewhere) without coverage, while an unintended windfall in favor of nonresident workers who had a Minnesota trustee would have strained the financial capabilities of the Association and required

Minnesota residents to pay higher premiums to finance the Association's obligation to out-of-state residents. In sum, "the interest in the retroactive curing of such a defect in the administration of government outweighs the individual [trustee's] interest in benefiting from the defect." Hochman, *supra* at 705-06. Thus, we conclude that retroactive application of the 1992 amendment was a rational means by which to accomplish the state's legitimate goals.

Honeywell contends that retroactive application is arbitrary and irrational because there is no connection linking the Honeywell trustee to the ELIC failure that triggered coverage and because the amendment has a disparate impact on non-residents. Neither contention has merit. We have already determined that the retroactive application of the amendment was rational and prevented an unanticipated gap in coverage for resident plan participants and an unexpected windfall for nonresident plan participants. Because the context here is curative in nature, there is no need to demonstrate any connection of the Honeywell trustee to the ELIC failure in order for the legislation to be rational. We agree with the Association's contention that the amendment actually eliminates the arbitrary aspect of the prior legislation under which Minnesota residents may or may not have had coverage for their plan funds, depending solely upon the arbitrary residence of their plan trustee, over which they have no control. Additionally, the disparate impact results only from the state's legitimate interest in maintaining the welfare of its own citizens, not from arbitrariness or discrimination. Retroactive application does not deprive nonresidents of any rights (except the expectation of coverage based on the arbitrary residence of their trustee), and it does not place any added burdens or liabilities on nonresidents.

To the extent Honeywell argues that this case is fully controlled by *Coombes* and *Ettor*, we also disagree. As already noted, we question the continued vitality of these cases. Furthermore, even assuming they remain authorita-

tive, we conclude that they do not control the outcome in this situation. In our view, *Ettor* and *Coombes* do not stand for the proposition that an inviolable vested right exists whenever a statutory economic right accrues. In *Coombes*, the Court expressly protected what had become a vested contract right, independent of the statute. 285 U.S. at 448, 52 S.Ct. at 438. We have previously concluded that no contract rights are implicated by the 1992 amendment. This case involves legislation of economic matters which exist only by statute and have not been integrated into a private contract, and Honeywell did not even make choices in reliance on the preamendment Act. In *Ettor*, the Court protected a cause of action that provided a remedy for property damage to private property that occurred while the city graded streets for public use. 228 U.S. at 156, 33 S.Ct. at 430-31. In the present case, neither the state nor the Association caused a harm and then took away a remedy for the injury caused, as the city and state did in *Ettor*.

In sum, *Coombes* and *Ettor* are not directly applicable to the case at hand because each involves an element distinguishable from the type of economic legislation at issue here. Thus, even if *Coombes* and *Ettor* apply, they do not dictate a conclusion that accrued economic rights under the preamendment Act rise to the level of a vested right. Rather, in spite of the expectancies that may have been based upon the preamendment Act, the retroactive 1992 amendment was a rational means by which to accomplish the legitimate economic goal of ensuring the welfare of Minnesota resident workers.

III. CONCLUSION

Finding no violation of either the Contract Clause or the Due Process Clause through retroactive application of the 1992 amendment, we affirm the judgment of the district court.

LOKEN, Circuit Judge, with whom BOWMAN, Circuit Judge, joins, concurring.

I concur in Part II.B. of the court's opinion, concluding that the Minnesota statute at issue does not violate Honeywell's right to substantive due process, except to the extent that the rollover paragraph on pages 18 and 19 is inconsistent with my view of the Contract Clause issue. As to that issue, I respectfully disagree with the court's conclusion that no contract has been impaired, but I agree that there has been no *unconstitutional* impairment. Accordingly, I concur in the court's decision to affirm.

As the court explains, the modern Contract Clause analysis is (1) has the State impaired a contract, (2) is the impairment substantial, and (3) is the statute nevertheless a permissible exercise of the State's police power. *See General Motors v. Romein*, 503 U.S. 181, 186, 112 S.Ct. 1105, 1109, 117 L.Ed.2d 328 (1992); *Energy Reserves, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410, 103 S.Ct. 697, 703-04, 74 L.Ed.2d 569 (1983). The latter two factors are interrelated. "The severity of the impairment measures the height of the hurdle the state legislation must clear." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245, 98 S.Ct. 2716, 2723, 57 L.Ed.2d 727 (1978).

1. Was There a Contract. My starting point on this question is *Coombes v. Getz*, 285 U.S. 434, 440-42, 52 S.Ct. 435, 435-36, 76 L.Ed. 866 (1932), in which California repealed a constitutional provision holding corporate directors personally liable to creditors for embezzled or misappropriated corporate funds. In holding that the repeal unconstitutionally impaired a creditor's contract with a corporation, the Court described the repealed liability as "in its nature contractual." Justice Cardozo in dissent observed that to call the liability contractual was "a legal fiction . . . borrowed from the law of quasi contracts." But he nonetheless agreed that the Contract Clause may protect a creditor's "contract with a corporation secured in certain contingencies by a statutory liability."

To me, *Coombes* confirms that a statute may create a contract between private parties that the Contract Clause protects. *See also Steamship Co. v. Joliffe*, 2 Wall. 450, 69 U.S. 450, 456-57, 17 L.Ed. 805 (1864) (statute created contract between shipping company and harbor pilots); *Hawthorne v. Calef*, 2 Wall. 10, 69 U.S. 10, 22, 17 L.Ed. 776 (1864) (statute providing that stock is security for railroad's creditors created contract between creditors and shareholders). All recent Supreme Court cases analyzing whether a statute had created a contract for Contract Clause purposes dealt with obligations of the State, rather than, as in *Coombes*, obligations the State has compelled private parties to assume. But that should not alter the analysis. For example, even if a statute mandates the terms of a fire insurance policy, the policy is still a contract. *Accord In re Workers' Compensation Refund*, 46 F.3d 813, 818 (8th Cir.1995).

In this case, the statute created the Guaranty Association, a private non-profit entity consisting of all insurers wishing to do business in the State, and required that entity to guarantee the "covered policies" of its members in the event of an insolvency. That third party guaranty looks much like the statutory liability in *Coombes*. "In determining whether a particular statute gives rise to a contractual obligation, it is of first importance to examine the language of the statute." *National R.R. Passenger Corp. v. Atchison, Topeka & S.F. Ry.*, 470 U.S. 451, 466, 105 S.Ct. 1441, 1452, 84 L.Ed.2d 432 (1985). Here, the statute uses the word "guaranty" in its title and provides that the Association "shall . . . guarantee, assume, or reinsure" the obligations of its members. Minn.Stat. § 61B.06, subd. 1 (1986). A guaranty is a contract under Minnesota law. *See Baker v. Citizens State Bank of St. Louis Park*, 349 N.W.2d 552, 557-58 (Minn.1984). In these circumstances, Honeywell has had a "contract" impaired, either its underlying investment contracts with ELIC or, more directly, the guaranty by the Guaranty Association. The contrary conclusion of the Minnesota Supreme Court, though entitled to deference in its con-

struction of state law, is not binding on us for Contract Clause purposes. *See Romein*, 503 U.S. at 187, 112 S.Ct. at 1110.

2. Was the Contract Substantially Impaired. Total destruction of a contract is a substantial impairment. *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 431, 54 S.Ct. 231, 237, 78 L.Ed. 413 (1934). At first glance, this case seems to involve total destruction of the guaranty rights of non-resident Honeywell employees. But that ignores the nature of the guaranteed contracts. As a GIC trade association monograph explained, GICs are assets of the pension plan. Individual employees do not own any part of a GIC, nor do employees have any individual rights under the contract." Thus, properly viewed, the impairment is partial—a reduction in the Association's guaranty obligation to the Honeywell Plan. (Whether that loss to the Plan must ultimately be borne only by non-resident beneficiaries is an issue not before us.)

Though partial, the impairment is quantitatively substantial—based on the percentage of non-resident Honeywell employees, the statutory amendment deprived the Plan of some 75% of its guaranty claim against the Association. In addition, the impairment was not merely incidental to another legislative purpose; the statute was enacted to impair. *Compare Energy Reserves*, 459 U.S. at 418, 103 S.Ct. at 708; *Exxon v. Eagerton*, 462 U.S. 176, 194 n. 14, 103 S.Ct. 2296, 2307, 76 L.Ed.2d 497 (1983).

Beyond the sheer magnitude of an impairment, the Supreme Court looks at whether the impaired term was central to the contract, whether settled expectations have been disrupted, and whether the impaired right was reasonably relied on. *See El Paso v. Simmons*, 379 U.S. 497, 514, 85 S.Ct. 577, 586-87, 13 L.Ed.2d 446 (1965); *Spannaus*, 438 U.S. at 243 n. 14, 98 S.Ct. at 2722 n. 14. In general, when an industry is heavily regulated, parties are considered to have less reasonable expectation that

legislation will not alter their contractual arrangements. *See Energy Reserves*, 459 U.S. at 411, 103 S.Ct. at 704. These other factors cut against the substantiality of this impairment. As in *Veix v. Sixth Ward Bldg. & Loan Ass'n of Newark*, 310 U.S. 32, 38, 60 S.Ct. 792, 794-95, 84 L.Ed. 1061 (1940), the industry is both heavily regulated and "regulated in the particular to which [Honeywell] now objects," since the State created the impaired guaranty. Honeywell cannot show substantial reliance on the Association's guaranty when it purchased the GICs in 1988 because the Association has broad power to unilaterally impose conditions on its guaranty obligations, subject to the Commissioner's approval, including the power to declare a moratorium on payments. *See* Minn. Stat. § 61B.06, subds. 1-3 (1986); *Honeywell v. Minnesota Life & Health Ins. Guar. Ass'n*, 518 N.W.2d 557, 563 (Minn. 1994).

On the other hand, recent Eighth Circuit cases have looked unfavorably on retroactive legislation impairing contracts, even in heavily regulated industries. *See Workers' Compensation Refund*, 46 F.3d at 820 (statute confiscating excess reinsurance premiums invalid though reinsurance plan documents incorporated changes in state law); *Holiday Inns Franchising, Inc. v. Branstad*, 29 F.3d 383, 384 (8th Cir.), (statute retroactively restricting franchisor termination rights invalid), *cert. denied*, —— U.S. ——, 115 S.Ct. 613, 130 L.Ed.2d 522 (1994); *Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Dept. of Public Welfare*, 742 F.2d 442, 451 (8th Cir. 1984) (statute retroactively reducing nursing home rates for medicaid patients invalid "because it disrupts settled and completed financial arrangements under contracts made in reliance on existing law"), *cert. denied*, 469 U.S. 1215, 105 S.Ct. 1191, 84 L.Ed.2d 337 (1985).

On balance, I conclude this impairment is substantial. Honeywell lost 75% of its guaranty benefits. *Cf. Spannaus*, 438 U.S. at 247, 438 U.S. at 239-40 (statute imposing $185,000 pension charge on employer closing

state office was substantial impairment). Thus, on the sliding scale the Supreme Court uses for the last two Contract Clause factors, this impairment requires close scrutiny of the State's justification.

3. Is the Substantial Impairment Justified. The economic interests of a state may justify its impairing contracts, *see, e.g., Blaisdell*, 290 U.S. at 437, 54 S.Ct. at 239-40, but the Contract Clause imposes limits on that power. "Legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 22, 97 S.Ct. 1505, 1518, 52 L.Ed.2d 92 (1977). Given the deference paid to state legislatures, especially when the State is not a party to the impaired contract, most claims founder on this aspect of the modern Contract Clause analysis. The Supreme Court looks hard at whether there is a legitimate public purpose and then defers to the legislative judgment as to the reasonableness of a particular remedy. *See Energy Reserves*, 459 U.S. at 412-13, 103 S.Ct. at 704-06.

Of particular importance in this case, the Court has stated that it is reasonable to amend a statute to eliminate unforeseen consequences or windfall benefits, even if that impairs existing contracts. *See U.S. Trust*, 431 U.S. at 31 & n. 30, 97 S. Ct. at 1522 & n. 30; *Energy Reserves*, 459 U.S. at 412, 103 S.Ct. at 704-05. For example, the Court in *U.S. Trust* explained that the amendment in *El Paso* was valid because it simply limited parties "to those gains reasonably to be expected from the [original] contract." Conversely, the amendment struck down in *U.S. Trust* was not in response to windfall benefits or unforeseen consequences because it repealed a provision expressly prohibiting the use of Port Authority revenues for transportation subsidies.

In this case, the Minnesota Legislature based its initial 1977 statute on the NAIC Model Life & Health Guaranty Association Act. The Model Act at that time provided

that the association must guarantee all obligations of an insolvent *domestic* insurer. For an insolvent foreign or out-of-state insurer, however, the association only guaranteed "the covered policies of residents," and it would have "no liability" if that insurer's home State provided "substantially similar" protection "for residents of other states." *See*, Minn.Stat. § 61B.06, subds. 2 and 4 (1986). In other words, if every State had enacted this Model Act and uniformly applied it, the association in an insolvent U.S. insurer's home State would pay *all* guaranty claims. But if an offshore insurer grabbed everyone's money and went under, each State's association would guarantee the covered policies of that State's residents.

In this environment, Honeywell's guaranty claim for its investment in ELIC GICs posed a substantial unforeseen consequence in Minnesota for three reasons. First, the legislators who enacted the initial Minnesota statute in 1977 did not foresee that, unlike regulators in most every other State, Minnesota's Commissioner would take the position in the 1980s, before ELIC became insolvent, that GICs are "covered policies," and the Supreme Court of Minnesota would agree in *Minnesota Life & Health Ins. Guar. Ass'n v. Department of Commerce*, 400 N.W.2d 769, 773-74 (1987). As a result of this lack of uniform implementation, when Honeywell sent its ELIC claims to all fifty States, it received blanket denials from most everyone except Minnesota.

Second, the Legislature did not foresee that "covered policies" would include group annuities in which a single contract holder, rather than thousands of beneficiaries, is the "resident." One can argue that this issue was reasonably foreseeable. But I see no indication that even the drafters of the various Model Acts anticipated the problem before 1985. That the issue was unforeseen is confirmed by the fact that any careful drafter familiar with ERISA insurance-funded group life and health plans would not try to solve this complex an issue with the single word "resident."

Third, Honeywell took the position that the $300,000 statutory ceiling on the Association's liability "for all benefits . . . with respect to any one life," Minn.Stat. § 61B.06, subd. 8 (1986), does not apply to its GIC claims. That exposed the Association to a $111,000,000 claim, far more than any State has allowed in *expressly* covering GICs. *See* Minn.Stat. § 61B.19, subd. 4(6) (1996) ($7,500,000 limit on claims regarding "unallocated annuities of a retirement plan"); 1985 NAIC Model Act § 3(c)(2)(B) ($5,000,000 limit).

Faced with this surprising confluence of factors that produced a genuinely unforeseen consequence and arguable windfall benefit, the Legislature enacted an amendment that reduced the Association's statutory guaranty to a level that Honeywell (or any other plan sponsor) should reasonably have expected from the statute as originally enacted: because GICs are not "covered policies" in California, ELIC's home State, the Minnesota Association must guarantee ELIC's GIC obligations to Minnesota residents; therefore, the Honeywell Plan is entitled to a guaranty benefit equal to that portion of its GIC contracts that represent investments on behalf of its Minnesota resident beneficiaries.

In enacting this amendment, the State acted in furtherance of the legitimate economic interests of its citizens.[3] The effect of its action was to reduce a state-mandated private benefit in a manner not inconsistent with the reasonable expectations of the parties to that "contract." In these circumstances, I concur in the court's conclusion that Minnesota did not unconstitutionally impair the Con-

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[3] As the court observes in its substantive due process discussion, because the Association's liabilities are unfunded—claims are paid by post-insolvency assessments of the remaining, solvent members—it does not take a team of actuaries to deduce that if Minnesota compels the Association to bestow uniquely generous guaranty benefits on the non-Minnesota customers of this year's insolvent insurer, ELIC, the Association's members must eventually recoup those benefits by imposing higher insurance premiums on future Minnesota policyholders.

tract Clause rights of the Honeywell Plan trustee or the Plan's ultimate employee beneficiaries.

RICHARD S. ARNOLD, Chief Judge, with whom McMILLIAN, MAGILL, BEAM, and MORRIS SHEPPARD ARNOLD, Circuit Judges, join, dissenting.

I agree with Judge Loken that a contract was impaired by the Minnesota Legislature's amendment of section 61B. I also believe that impairment was substantial within the meaning of the Contracts Clause, and not sufficiently justified. I therefore respectfully dissent.

The lead opinion holds that there was no contract to be impaired when the Minnesota Legislature amended § 61B to exclude out-of-state-resident life-insurance policyholders and other beneficiaries from its coverage. As Judge Loken's opinion explains, it is settled law that obligations between private parties which are mandated by statute may nonetheless be contractual and enforceable as such. The statute which created the Minnesota Life and Health Insurance Guaranty Association states that the Association was created to protect the rights of policyowners and other beneficiaries by guaranteeing the obligations owed them by insurance companies. Minn.Stat. § 61B.02 subd. 2 (1990) ("The purpose of sections 61B.01 to 61B.16, is to protect policyowners, death benefit certificate holders, insureds, beneficiaries, annuitants, payees, and assignees of life insurance policies, health insurance policies, annuity contracts and supplemental contracts. . . ."). The duty to guarantee the obligations of member insurance companies appears to be the Association's primary reason for existence. The power to collect assessments from member companies exists to enable the Association to fulfill that duty. A guaranty is itself a kind of contract, an undertaking to fulfill the obligation of another if that other is in default.

It seems improbable that the Legislature would create a separate, nonprofit legal entity and endow it with the

power to collect assessments from member insurance companies without demanding reciprocal performance from the Association. The words of the statute belie such a possibility: "If a domestic insurer is an impaired insurer [unable to meet its obligations to policyholders and other beneficiaries], the association shall . . . guarantee, assume, or reinsure, or cause to be guaranteed, assumed, or reinsured, the covered policies of the impaired insurer. . . ." Minn.Stat. 61B.06 subd. 1(b); see also § 61B.06 subd. 2 (pertaining to foreign insurers). The lead opinion today holds the Association did not owe a contractual duty to guarantee all covered policies because a legislature must exhibit a clear indication that it intends to bind itself contractually before it will be considered to be so bound. The Legislature in the instant case did not bind itself, however, it bound the Association. The Legislature created the Association to collect membership fees from insurance companies and to assume the obligations of those companies should they become "impaired." I therefore agree with Judge Loken that the obligations owed by the Association, even though their origin is in the statute, are nonetheless contractual and not merely "statutory."

It follows that the Minnesota Legislature's amendment of the statute was an impairment of a contract. Two sets of contractual relationships were impaired by the Legislature's action: that between Honeywell's trustee and the Association, and that between the trustee and ELIC. The former is affected because the Association, under the amended statute, is released from most of its duty to guarantee the obligation owed the trustee. The latter is affected because the trustee contracted with ELIC under the prior version of the statute, and consequently under the assumption that the GICs were fully guaranteed by the Association.

Judge Loken's concurring opinion concludes that there was only a partial destruction of the contract in this case, because the amendment merely diminished the Associa-

tion's obligation to guarantee the GICs, rather than destroying that obligation completely. As Judge Loken recognizes, a substantial impairment need not be a total destruction to violate the Contracts Clause. I agree that the impairment in this case was substantial. Indeed, the Minnesota Legislature chose which investments to protect and which to abandon at the level of the individual, according to the individual's state of residence. It specifically intended to abrogate the Association's duty to guarantee a given obligation based on the individual investor to whom that duty was owed. It therefore seems appropriate to view the Legislature's action as a complete destruction of those individual contractual relationships.

The Supreme Court has held that the Constitution does not prevent a legislature from working a substantive change in the law, and impairing contracts thereby, as long as it had sufficient justification for doing so. "[L]egislation adjusting the rights and responsibilities of contracting parties" will not violate the Contracts Clause if it is created "upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *Allied Structural Steel v. Spannaus,* 438 U.S. 234, 244, 98 S.Ct. 2716, 2722, 57 L.Ed.2d 727 (1978) (internal quotation omitted).

One possible justification for the amendment could be to avoid unforeseen consequences or windfall benefits. Under that view, the Legislature could not have foreseen that Minnesota's Association would be the only one which guaranteed GICs as "covered policies." To the contrary, it was not only foreseeable, but readily ascertainable, that other states did not treat GICs the way Minnesota did. Minnesota's Commissioner and its State Supreme Court both came to that conclusion in the 1980s.

Minnesota also, it is argued, could not have intended to guarantee coverage of policies based simply on the residence of a trustee. The coverage mandated by such a rule, the argument continues, is far more expansive than

the Legislature could have anticipated. Perhaps the Legislature did not anticipate that the Association would incur such a large obligation. But it should have; the language of the statute is not so ambiguous that such a reading should be surprising. Under the subdivision which applies to out-of-state impaired insurers, the statute requires the Association to "guarantee, assume, or reinsure or cause to be guaranteed, assumed, or reinsured, the covered policies of residents, and shall make or cause to be made prompt payment of the impaired insurer's contractual obligations which are due and owing to residents." Minn.Stat. § 61B.06 subd. 2. It was clear when Honeywell applied for coverage of its ELIC GICs that GICs were already "covered policies" in Minnesota. The ambiguity is allegedly whether "residents" could foreseeably have included a trustee which held several "covered policies" on behalf of both resident and non-resident beneficiaries. The statute defines "resident" in § 61B.03: " 'Resident' means any person who resides in this state at the time the impairment is determined and to whom contractual obligations are owed." "Person," according to the statute, "means any individual, corporation, partnership, association or voluntary organization." Minn.Stat. § 61B.03 subd. 12-13. The drafters should have realized that individual corporations, partnerships, associations, and voluntary organizations could hold numerous covered policies on behalf of employees or other beneficiaries. I therefore cannot agree that the Legislature's amendment of the statute is justified because of unforeseeable consequences.

That the amendment imposed a retroactive change raises the "hurdle" the state must clear in order to justify a substantial impairment of contracts. Legislation which makes prospective changes affecting private contracts is an appropriate and commonplace legislative function; private contracting parties, especially in regulated industries, should expect that laws and regulations may change and affect their future dealings. We examine the state's justification for retroactive changes more carefully because the

opposite is generally true: private contracting parties should and do expect that the conditions under which they contracted will remain in effect unless and until there is a change. They do not normally expect lawmakers to change the basic assumptions underlying those agreements so as to affect legal obligations incurred, or rights vested, in the past. See *Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Dep't of Pub. Welfare,* 742 F.2d 442, 450-51 (8th Cir.1984) (upholding prospective change but striking down retroactive change because it "disrupt[ed] settled and completed financial arrangements under contracts made in reliance on existing law"), *cert. denied,* 469 U.S. 1215, 105 S.Ct. 1191, 84 L.Ed.2d 337 (1985); *Holiday Inns Franchising, Inc. v. Branstad,* 29 F.3d 383, 385 (8th Cir.) (observing that retroactive changes which alter prior contractual relationships have "almost uniformly been declared unconstitutional," and "this is a datum on which [parties] are presumably allowed to rely while bargaining"), *cert. denied,* —— U.S. ——, 115 S.Ct. 613, 130 L.Ed.2d 522 (1994).

The Minnesota Legislature in this case deliberately effected a retroactive change in the law to allow the Association to avoid a $110 million payout. The Minnesota Supreme Court has held that the Legislature's amendment was a change, and not a clarification of the statute. *Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Ass'n,* 518 N.W.2d 557, 562 (Minn.1994). The Legislature's action was a deliberate, retroactive change in the law which altered the settled contractual duties of the Association, and greatly impaired Honeywell's right to payment. The size of the payout, while substantial, does not seem to me to provide sufficient justification for the change. Indeed, the large size of the payout serves only to underscore the substantiality of the obligation that the Legislature has nullified.

Many reasons underlay the determination of the Framers to create a new Constitution. Perhaps none was more

prominent than their conviction that States should not be allowed to destroy or water down contracts for the payment of money. The Contracts Clause "was perhaps the strongest single constitutional check on state legislation during our early years as a Nation. . . ." *Allied Structural Steel Co. v. Spannaus, supra,* 438 U.S. at 241, 98 S.Ct. at 2720-21 (footnote omitted). I regret that this Court today shrinks from enforcing this part of the Constitution, which is designed to safeguard a basic human right, the right to make private contracts. It is not a coincidence that most of the people injured by this statute cannot vote for the Minnesota Legislature.

I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No 95-1754

HONEYWELL, INC.; HONEYWELL PENSION AND RETIREMENT COMMITTEE, on their own behalf and on behalf of the Honeywell Retirement Investment Plan; INVESTMENT PLUS PLAN OF HONEYWELL, INC.; HONEYWELL RETIREMENT SAVINGS PLAN; FIRST TRUST NATIONAL ASSOCIATION,

Plaintiffs-Appellants,

v.

MINNESOTA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION,

Defendant-Appellee.

Submitted Nov. 16, 1995
Decided June 10, 1996

Rehearing and Rehearing En Banc Granted;
Opinion and Judgment Vacated
Aug. 27, 1996

Before HANSEN, JOHN R. GIBSON, and MURPHY, Circuit Judges.

HANSEN, Circuit Judge.

The plaintiffs (collectively referred to as Honeywell) appeal the district court's [1] grant of summary judgment for the defendant, Minnesota Life and Health Insurance Guaranty Association (the Association), in this declaratory judgment suit. At issue is whether an amendment to a Minnesota statute, which amendment applies retroactively, violates either the Contract Clause or the Due Process Clause of the Constitution of the United States. The district court granted the Association's motion for summary judgment and dismissed Honeywell's complaint, concluding that the amendment passes constitutional muster. We affirm.

I. BACKGROUND

Honeywell, Inc. is a Delaware corporation with its principal place of business in Minnesota. Honeywell sponsors certain defined contribution benefit and retirement plans for its employees. These plans include the Honeywell Retirement Investment Plan, the Investment Plus Plan of Honeywell Inc., and the Honeywell Retirement Savings Plan. The current trustee of the Honeywell plans is First Trust National Association, which has its principal place of business in Minnesota.

The Association is a nonprofit Minnesota corporation created pursuant to the Minnesota Life and Health Insurance Guaranty Association Act (the Act), Minn.Stat. Ann. §§ 61B.01-61B.16 (West 1986).[2] The Association exists to protect the contractual rights of policy owners and beneficiaries of life insurance policies, health insurance

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[1] The Honorable Richard H. Kyle, United States District Judge for the District of Minnesota.

[2] This Act has been repealed and was replaced in 1993 with Minn. Stat. Ann. §§ 61B.18-61B.32 (West Supp.1996). The legislature provided, however, that §§ 61B.01-61B.16, as amended in 1992, remain applicable to the subject of this suit. *Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Assoc.*, 518 N.W.2d 557, 558 n. 4 (Minn.1994). The issue in this case deals with a 1992 amendment to the Act, and not the new 1993 version of the Act.

policies, and annuity contracts (subject to certain definitions and limitations), when the insurer that issued the life insurance, health insurance, or annuity contract becomes financially unable to perform its obligations. *See* Minn. Stat. Ann. § 61B.02, subd. 2. *See also Minnesota Life & Health Ins. Guar. Assoc. v. Department of Commerce,* 400 N.W.2d 769, 770 (Minn.Ct.App.1987). To provide this protection, all insurance companies that deal in life, health, and annuity contracts and elect to do business in Minnesota are required to join and contribute to the Association. *Minnesota Life,* 400 N.W.2d at 770. The dispute in this case arose following the 1991 insolvency of an out-of-state member insurance company and the 1992 enactment by the Minnesota legislature of an amendment that retroactively redefines the term "contractual obligation" under the Act.

In 1988, the Honeywell plans' trustee, who was a Minnesota resident (as is the current trustee), invested in Guaranteed Investment Contracts (GICs) issued by Executive Life Insurance Company of California (ELIC), a member of the Association. GICs are unallocated annuity contracts, or annuity contracts "not issued to or owned by a named individual." *Id.* GICs are investments made by the trustee for the benefit of the plan participants and are considered covered policies under the Act. *See id.* at 775 (holding that GICs are covered annuities under Minn.Stat. § 61B.03, subd. 3 (1984)). The Honeywell GICs expressly name the Honeywell trustee as the policy owner, and not the individual plan participants for whom the investment was made. *Honeywell,* 518 N.W.2d at 561.

In 1991, ELIC became insolvent and unable to fulfill its contractual obligations on the Honeywell GICs, which amounted to $111,000,000. By letter dated January 10, 1992, the Honeywell trustee, as the resident policy owner, submitted to the Association a claim for guaranty coverage under the Act. Honeywell sought coverage for ELIC's entire obligation to the Honeywell trustee, which would

inure not only to the benefit of Honeywell's 9,000 Minnesota resident plan participants but also to Honeywell's 27,000 nonresident plan participants.

The Association neither granted nor denied Honeywell's claim initially. ELIC's insolvency had also affected approximately 10,000 other Minnesota residents who were employed in Minnesota by other companies whose plan trustees owned GICs but which trustees were *not* Minnesota residents. At that time, the Act required the Association to guarantee the covered policies of "residents" to whom any "contractual obligation" was owed from an out-of-state insurer. Minn.Stat. Ann. § 61B.06, subd. 2 (West 1986). *See Honeywell,* 518 N.W.2d at 558. The term "resident," defined as "any person who resides in this state at the time the impairment is determined and to whom contractual obligations are owed," Minn.Stat. Ann. § 61B.03, subd. 13 (West 1986), was broad enough to include a trustee who resided in Minnesota. *Honeywell,* 518 N.W.2d at 560-61. The term "contractual obligation," defined as "any obligation under covered policies," Minn.Stat. Ann. § 61B.03, subd. 5 (West 1986), was broad enough to include a GIC obligation owed to a resident trustee. *Honeywell,* 518 N.W.2d at 560-61. Thus, as then codified, the Act, combined with ELIC's insolvency, created the potential that all the Honeywell plan participants, thousands of whom were not residents of Minnesota, might be entitled to coverage under the Minnesota Act because their plan trustee happened to be a Minnesota resident. Whereas, many other Minnesota non-Honeywell employed resident plan participants, who worked for companies whose plan trustee resided in a different state, might not be entitled to any coverage because their trustee (the one to whom the contractual obligation was owed) was not a Minnesota resident.

Faced with this dilemma, on January 21, 1992, the Minnesota Department of Commerce (which supervises and regulates the Association and to whom appeals may be

taken from the Association's determinations, *see* Minn.Stat. Ann. § 61B.09(c)), issued an opinion, advising the Association chairman on the coverage problems created by the ELIC insolvency:

> The Department believes it is the clear intent of the Act to cover the people of Minnesota. Accordingly, it is the Department's position that the Guaranty Association Act provides coverage to Minnesota resident employees who are the beneficiaries of defined-contribution pension plans funded by Guaranteed Investment Contracts purchased from Executive Life.
>
> Consistent with that position the Department has determined that non-resident employees of such a plan, regardless of the residency of the trustee or plan sponsor, are not covered under the Act.

(Appellee's App. at GA-59.)

Subsequently, on April 27, 1992, the governor signed into law an amendment to the definition of the term "contractual obligation," in a purported attempt to retroactively "clarify" the statutory coverage in a manner consistent with the Department of Commerce opinion. *Honeywell,* 518 N.W.2d at 562. The 1992 amendment, which specifically applies retroactively, narrowed the definition of "contractual obligation" to specifically *exclude* any obligation owed "to nonresident participants of a covered plan or to the plan sponsor, employer, trustee, or other party who owns the contract; in such cases, the association is obligated under this chapter only to participants in a covered plan who are residents of the state of Minnesota on the date of impairment." 1992 Minn. Laws, ch. 540. Thus, the amendment expressly provides coverage only to plan participants who are Minnesota residents. In light of the opinion of the Department of Commerce and the retroactive 1992 amendment, the Association took the position that its guaranty obligation to Honeywell covers only those Honeywell plan participants who resided in Minnesota when ELIC became insolvent.

Honeywell then brought an action for declaratory and injunctive relief and monetary damages in Minnesota state court based on the Association's refusal to fully guaranty the whole of the trustee's claim. Honeywell sought a declaration that retroactive application of the 1992 amendment violates both the Contract Clause and the Due Process Clause of the Constitution because Honeywell's entitlement to coverage and payment under the prior statute had fully accrued before the enactment of the 1992 amendment. The Association removed the case to federal district court pursuant to 28 U.S.C. § 1441.

After removal, the parties filed cross motions for summary judgment. The district court ruled in favor of Honeywell, holding that the retroactive abrogation of Honeywell's guaranty coverage rights impermissibly destroyed vested rights in violation of both the Contract Clause and the Due Process Clause of the Constitution. After the Association moved for reconsideration, however, the district court vacated its initial opinion and certified two questions to the Supreme Court of Minnesota: (1) Did the 1992 amendment to the Act's definition of "contractual obligation" effect a substantive change in the Association's obligations or merely clarify existing obligations? (2) Is the annuity contract owner's (the trustee's) right to guaranty payment from the Association a purely statutory right or is it contractual in nature? The Supreme Court of Minnesota ruled on the certified questions, holding that (1) the 1992 amendment to the definition of "contractual obligation" substantively changed the Association's coverage obligations, and (2) the right to payment from the Association is a purely statutory right under state law. *See Honeywell,* 518 N.W.2d at 563.

After the Supreme Court of Minnesota responded to the certified questions, the parties again filed cross motions for summary judgment. This time, the district court granted the Association's motion for summary judgment, concluding that retroactive application of the 1992 amendment did not violate either the Contract Clause or the Due

Process Clause, and dismissed Honeywell's complaint with prejudice. Honeywell appeals.

II. DISCUSSION

Honeywell contends that its preamendment right to insurance guaranty coverage is contractual in nature and that retroactive application of the amendment constitutes the impairment of its contractual rights in violation of the Contract Clause. Honeywell also argues that the 1992 amendment arbitrarily and irrationally destroyed its accrued, vested right to guaranty coverage, in violation of the Due Process Clause. We begin our analysis with the Contract Clause.

A. CONTRACT CLAUSE

The Constitution provides, "No State shall . . . pass any Law impairing the Obligation of Contracts. . . ." U.S. CONST. art. I, § 10, cl. 1. Read literally, this constitutional prohibition bans any interference with contracts, but cases interpreting the clause clearly indicate that this prohibition "is not an absolute one and is not to be read with literal exactness like a mathematical formula." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 428, 54 S.Ct. 231, 236, 78 L.Ed. 413 (1934). Instead, when a litigant contends that a legislative amendment has impermissibly impaired contractual obligations, our inquiry initially focuses on "whether the change in state law has 'operated as a substantial impairment of a contractual relationship.' " *General Motors Corp. v. Romein*, 503 U.S. 181, 186, 112 S.Ct. 1105, 1109, 117 L.Ed.2d 328 (1992) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244, 98 S.Ct. 2716, 2722, 57 L.Ed.2d 727 (1978)) (other citation omitted). Three basic components are essential to this inquiry: (1) Does a contractual relationship exist, (2) does the change in the law impair that contractual relationship, and if so, (3) is the impairment substantial? *Id.* If we conclude that a substantial impairment of a contractual relationship exists, we must

then carefully examine "the nature and purpose of the state legislation." *Allied Structural Steel Co.*, 438 U.S. at 245, 98 S.Ct. at 2723.

We first consider whether a contractual relationship exists. In this case, the district court certified to the state supreme court the question of whether the Association's guaranty obligation to GIC owners, such as the Honeywell trustee, is a contractual or a statutory obligation. The Supreme Court of Minnesota determined that the right to payment from the Association is a purely statutory right under *state* law. *Honeywell*, 518 N.W.2d at 563. Honeywell first contends that the district court erroneously certified a question of federal constitutional law to the state court.

While federal courts "accord respectful consideration and great weight to the views of the State's highest court," the determination of whether the Act created a contractual obligation "is a federal question for purposes of Contract Clause analysis, and whether it turns on issues of general or purely local law, we can not surrender the duty to exercise our own judgment." *Romein*, 503 U.S. at 187, 112 S.Ct. at 1110 (internal quotations omitted). Contrary to Honeywell's assertion, however, the district court did not avoid its duty to determine the constitutional issue by certifying a question to the state supreme court. Instead, the district court gave proper consideration to the state court's views but independently determined that the right to payment under the Act is not contractual within the meaning of the Contract Clause. We review de novo the district court's judgment on this constitutional question. *See United States v. Bates*, 77 F.3d 1101, 1104 (8th Cir.1996).

Our independent review leads us to agree with the district court that the rights at issue are statutory in nature and therefore, no contractual relationship existed between Honeywell and the Association. Two factors lead us to this conclusion: (1) the Act itself does not create a contract, and (2) the GICs do not specifically incorporate the terms of the Act.

First, the Act's guaranty is not itself a contract between the Association and those who qualify for the Act's protection. "In general, a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 18 n. 14, 97 S.Ct. 1505, 1516 n. 14, 52 L.Ed.2d 92 (1977). The right to payment under the Act is not enforceable against the state of Minnesota but is an obligation imposed upon the Association. The Association is a nonprofit legal entity and not a state agency. Minn.Stat. Ann. § 61B.04, subd. 1 (West 1986). *See also* Minn.Stat. Ann. § 61B.21, subd. 1 (West Supp.1996). Even if the Association were a state agency, the Act contains no "clear indication that the legislature intends to bind itself contractually," which is necessary in order to overcome the general presumption "that at law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 465-66, 105 S.Ct. 1441, 1451, 84 L.Ed.2d 432 (1985) (quotations omitted). Rather, the Act creates an insurance guaranty association with attendant statutory obligations to safeguard the financial well-being of Minnesota residents to whom contractual obligations are owed by its member insurance companies. The Act does not create a contract; instead, it creates a statutory safety net to protect the economic well-being of Minnesota resident policy owners in the event a member insurer becomes insolvent.

Second, while the Association has the power to enter into contracts, Minn.Stat. Ann. § 61B.06, subd. 9(a) (West 1986), the Association is not a party to the GICs involved here. The GICs at issue are contracts between the Honeywell trustee and the impaired ELIC, not the Association. The Honeywell trustee did not specifically bargain for protection under the Act, and the Act is not expressly or impliedly incorporated into the terms of the

GICs. "For the most part, state laws are implied into private contracts regardless of the assent of the parties only when those laws affect the validity, construction, and enforcement of contracts." *Romein*, 503 U.S. at 189, 112 S.Ct. at 1110. The Association's statutory obligation to guaranty the insurance coverage of residents protected by the Act does not in any way affect the validity, construction, or enforcement of ELIC's obligation on the GICs. Moreover, there is no evidence that the GICs were created in pursuance of the statutory obligation. *Cf. Coombes v. Getz*, 285 U.S. 434, 442, 448, 52 S.Ct. 435, 436, 438, 76 L.Ed. 866 (1932) (upholding the contractual liability created pursuant to a state constitutional rule of law that was repealed). The 1992 amendment merely altered definitions under the Act, which in turn affect the Association's statutory obligation to the Honeywell trustee, but the amendment did not alter or affect any bargained-for agreement between the Association and the Honeywell trustee. The Contract Clause does not "protect against all changes in legislation, regardless of the effect of those changes on bargained-for agreements." *Romein*, 503 U.S. at 190, 112 S.Ct. at 1111.

We conclude that the Association's obligations are statutory in nature rather than contractual. Absent the existence of a contractual relationship, our Contract Clause inquiry is finished. The 1992 amendment simply does not implicate the Contract Clause.

B. DUE PROCESS

Honeywell's due process claim presents a closer question. Honeywell argues that retroactive application of the 1992 amendment defeats its vested right to payment under the Act, in violation of the Due Process Clause. Honeywell relies on *Coombes*, 285 U.S. at 439-48, 52 S.Ct. at 435-38, where the Supreme Court held unconstitutional the repeal of a California state constitutional provision that provided a cause of action against corporate directors. The Court stated in absolute terms that "neither

vested property rights nor the obligation of contracts of third persons may be destroyed or impaired." *Id.* at 442, 52 S.Ct. at 436. More specifically, the Court in *Coombes* held, "a contractual obligation arose; and the right to enforce it, having become vested, comes within the protection of both the contract impairment clause in Art. 1, § 10, and the due process of law clause in the Fourteenth Amendment, of the Federal Constitution." *Id.* at 448, 52 S.Ct. at 438. Honeywell also relies on *Ettor v. City of Tacoma*, 228 U.S. 148, 158, 33 S.Ct. 428, 431, 57 L.Ed. 773 (1913), where the Supreme Court held that a statutory right to compensation for property damage caused by the city in the course of grading streets, which right to compensation was complete before a repeal of the cause of action, was a vested property right that could not be retroactively destroyed. Claiming that these cases control the outcome of the case at hand, the Honeywell trustee asserts a vested right to payment under the Act as it existed when ELIC became insolvent, prior to the 1992 amendment.

The Association, on the other hand, urges us to follow more recent Supreme Court precedents in which the Court reviews economic legislation with a very deferential eye and does not accord vested rights status to economic rights. The Association observes that under this modern approach, due process is satisfied as long as a reasonable legislative purpose supports the retroactive application of the legislation. The Association contends that the retroactive 1992 amendment is supported by a reasonable legislative purpose, and alternatively, that no vested rights accrued in favor of the Honeywell trustee upon ELIC's insolvency.

In one sense, both arguments are right. The Supreme Court has never expressly overruled the reasoning of *Ettor* and *Coombes*, which accords great protection to accrued statutory causes of action. In the area of economic legislation, however, we cannot ignore the abundance of cases where substantive due process has evolved into a defer-

ential rational basis analysis. We believe that an understanding of the historical context of *Ettor* and *Coombes* is essential to divine accurately the present weight of their authority on the issue before us. *See Hammond v. United States*, 786 F.2d 8, 11 (1st Cir.1986) (questioning the continued vitality of *Coombes* and *Ettor* because recent cases have retroactively abridged economic and real property rights without always carefully distinguishing these prior cases). *See also* W. David Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 Cal. L. Rev. 216, 232 (1960) ("The decision [of *Coombes v. Getz*] seems far too rigid in its conception of permissible legislative change and would almost certainly not be followed today.").

Ettor and *Coombes* were decided during what is referred to in the history of American jurisprudence as the *Lochner* era, named for the pivotal case of judicial activism, *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (invalidating maximum work hours legislation as an unconstitutional exercise of police power). Cases of that era frequently invalidated statutes that limited economic autonomy in a manner thought by the Court to be unnecessary or unwise, but in more recent decisions, the Court plainly sees its role differently: "[W]e do not sit as a super legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423, 72 S.Ct. 405, 407, 96 L.Ed. 469 (1952). The reasoning prevalent during the "*Lochner* [era] has been implicitly rejected many times." *Whalen v. Roe*, 429 U.S. 589, 597 & n. 18, 97 S.Ct. 869, 875 & n. 18, 51 LEd.2d 64 (1977). *See also United States v. Carlton*, —— U.S. ——, ——-——, 114 S.Ct. 2018, 2023-24, 129 L.Ed.2d 22 (1994) (recognizing that three tax cases from the *Lochner* era "were decided during an era characterized by exacting review of economic legislation under an approach that 'has long since been discarded'" (citation omitted)); *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 861, 112

S.Ct. 2791, 2812, 120 L.Ed.2d 674 (1992) (recognizing that the demise of *Lochner* era reasoning began in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937)).

Within two years of the *Coombes* decision, substantive due process analysis in the area of retroactive economic legislation began to be framed in terms of reasonableness, drifting away from the *Lochner* era's strict protection of economic freedom and vested rights. *See Blaisdell*, 290 U.S. at 438, 54 S.Ct. at 240 (upholding as an emergency measure a mortgage moratorium law that impaired obligations on mortgage contracts). The Court acknowledged that even the expressly protected obligation of contracts (and similarly, we believe, the concept of vested rights) may be impaired by economic legislation if "the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end." *Id.* This rational basis substantive due process test appears to have supplanted the legislatively restrictive vested rights mode of analysis, and allows legislatures more freedom in dealing with economic situations. *See, e.g.*, James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 Cornell L.Rev. 87, 119 (Nov.1993) ("Modern jurists reject the categorical logic of vesting and consider the statute's justifications under the rubric of substantive due process."); Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 696-97 (1959-60) (noting that the vested rights analysis has been replaced by balancing three factors: (1) the nature and strength of the public interest served by the statute, (2) the extent to which the statute modifies or abrogates a preenactment right, and (3) the nature of the right altered by the statute).

In 1976, the Court announced, "It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on the one complaining of a due process violation to establish that

the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976). These authorities leave no doubt that, even though *Coombes* and *Ettor* have never been overruled by the Supreme Court, the modern framework for substantive due process analysis concerning economic legislation requires only an inquiry into whether the legislation is reasonably related to a legitimate governmental purpose. Given the criticism surrounding the Court's *Lochner* era decisions in general, coupled with the development of judicial deference to economic legislation since then, we join those who question the continued validity of the vested rights analysis of *Coombes* and *Ettor* when reviewing the constitutionality of economic legislation, recognizing as we must that only the Supreme Court itself can overrule its precedents. We rely instead on the more recent Supreme Court pronouncements of substantial due process analysis for economic legislation, which articulate a rational basis test.

Our task, then, is to determine whether the retroactive application of the 1992 amendment is justified by a rational legislative purpose, or whether it is illegitimate and arbitrary. Retroactive legislation, like prospective legislation, must meet the reasonableness test of due process. *Usery*, 428 U.S. at 17, 96 S.Ct. at 2893. "But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730, 104 S.Ct. 2709 at 2718, 81 L.Ed.2d 601 (1984). Retroactive economic legislation has been upheld as reasonable even in circumstances where it destroys a settled expectancy or imposes a new liability. *See, e.g., Carlton*, —— U.S. at ——-——, 114 S.Ct. at 2022-23 (upholding a curative measure that took away an expected and relied upon deduction for estate tax); *Gray*, 467 U.S. at 734, 104 S.Ct. at 2720 (upholding retroactive application of ERISA's withdrawal liability as supported by rational legislative purpose); *Usery*, 428 U.S. at 19-20, 96 S.Ct. at 2894-95 (upholding retroactive

aspects of Black Lung Benefits Act of 1972, which required employers to compensate former employees disabled by a work-related disease). The Court has repeatedly noted that although certain economic liabilities or burdens were not anticipated, nevertheless, " ' "our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." ' " *Concrete Pipe & Prod. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 637, 113 S.Ct. 2264, 2287, 124 L.Ed.2d 539 (1993) (quoting *Gray*, 467 U.S. at 729, 104 S.Ct. at 2718, quoting *Usery*, 428 U.S. at 16, 96 S.Ct. at 2893).

Using these standards, we conclude that the 1992 amendment redefining "contractual obligation" was neither arbitrary nor illegitimate. The state has a legitimate interest in regulating the insurance industry, easing the economic burdens of its own residents, and ensuring the economic life of an association created by its statute to protect its residents. The general purpose of the Act at issue in this case "is to protect the future financial stability of individuals," *Minnesota Life & Health Ins.*, 400 N.W.2d at 773, and the preamendment Act expressly provided protection to "residents" to whom "contractual obligations" are owed. Minn. Stat. § 61B.06, subd. 2 (1986). The 1992 amendment serves to narrow the definition of contractual obligation, explicitly providing coverage only to resident plan participants. This is a legitimate purpose.

The 1992 amendment is also curative in nature, even though it worked a substantive change in the law. *See Honeywell*, 518 N.W.2d at 560-63 (holding that the amendment worked a substantive change in the law because before the amendment, it plainly entitled resident policy owners, including trustees, to coverage). Curative legislation corrects an unintended and unanticipated mistake in the underlying legislation, which went undetected until some time after the original enactment. Certainly, legislatures have the authority to cure inadvertent defects in their legislation. *See Carlton*, —— U.S. at ——, 114

S.Ct. at 2022 (upholding Congress's attempt to cure a defect in the tax code). In *Carlton*, the Court concluded that Congress's purpose in retroactively taking away an estate tax deduction, even though the decedent's executor had relied upon it, was neither illegitimate nor arbitrary because "Congress acted to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss." —— U.S. at ——, 114 S.Ct. at 2023. We also note the observation of one commentator that "the individual who claims that a vested right has arisen from the defect is seeking a windfall since, had the legislature's . . . action had the effect it was intended to and could have had, no such right would have arisen." Hochman, *supra* at 705.

Here, the Minnesota legislature acted reasonably when it gave retroactive effect to the 1992 amendment in order to cure a drafting defect that might have inadvertently left thousands of Minnesota residents without coverage under the Act due to the ELIC debacle. We agree with the observation of the Supreme Court of Minnesota: "Given that unallocated annuity contracts were not prevalent at the time of the statute's enactment in 1977, the legislature likely did not contemplate how the Act specifically applied to these contracts." *Honeywell*, 518 N.W.2d at 561. Absent retroactive effect, an unintended gap in coverage would have left many Minnesota resident workers without coverage, while an unintended windfall in favor of nonresident workers who had a Minnesota trustee would have strained the financial capabilities of the Association and required Minnesota residents to pay higher premiums to finance the Association's obligation to out-of-state residents. In sum, "the interest in the retroactive curing of such a defect in the administration of government outweighs the individual [trustee's] interest in benefiting from the defect." Hochman, *supra* at 705-06. Thus, we conclude that retroactive application of the 1992 amendment was a rational means by which to accomplish the state's legitimate goals.

Honeywell contends that retroactive application is arbitrary and irrational because there is no connection linking the Honeywell trustee to the ELIC failure that triggered coverage and because the amendment has a disparate impact on non-residents. Neither contention has merit. We have already determined that the retroactive application of the amendment was rational and prevented an unanticipated gap in coverage for resident plan participants and an unexpected windfall for nonresident plan participants. Because the context here is curative in nature, there is no need to demonstrate any connection of the Honeywell trustee to the ELIC failure in order for the legislation to be rational. We agree with the Association's contention that the amendment actually eliminates the arbitrary aspect of the prior legislation under which Minnesota residents may or may not have had coverage for their plan funds, depending solely upon the arbitrary residence of their plan trustee, over which they have no control. Additionally, the disparate impact results only from the state's legitimate interest in maintaining the welfare of its own citizens, not from arbitrariness or discrimination. Retroactive application does not deprive nonresidents of any rights (except the expectation of coverage based on the arbitrary residence of their trustee), and it does not place any added burdens or liabilities on nonresidents.

To the extent Honeywell argues that this case is fully controlled by *Coombes* and *Ettor*, we also disagree. As already noted, we question the continued vitality of these cases. Furthermore, even assuming they remain authoritative, we conclude that they do not control the outcome in this situation. In our view, *Ettor* and *Coombes* do not stand for the proposition that an inviolable vested right exists whenever a statutory economic right accrues. In *Coombes*, the Court expressly protected what had become a vested contract right, independent of the statute. 285 U.S. at 448, 52 S.Ct. at 438. We have previously concluded that no contract rights are implicated by the 1992

amendment. This case involves legislation of economic matters which exist only by statute and have not been integrated into a private contract, and Honeywell did not even make choices in reliance on the preamendment Act. In *Ettor*, the Court protected a cause of action that provided a remedy for property damage to private property that occurred while the city graded streets for public use. 228 U.S. at 156, 33 S.Ct. at 430-31. In the present case, neither the state nor the Association caused a harm and then took away a remedy for the injury caused, as the city and state did in *Ettor*.

In sum, *Coombes* and *Ettor* are not directly applicable to the case at hand because each involves an element distinguishable from the type of economic legislation at issue here. Thus, even if *Coombes* and *Ettor* apply, they do not dictate a conclusion that accrued economic rights under the preamendment Act rise to the level of a vested right. Rather, in spite of the expectancies that may have been based upon the preamendment Act, the retroactive 1992 amendment was a rational means by which to accomplish the legitimate economic goal of ensuring the welfare of Minnesota resident workers.

III. CONCLUSION

Finding no violation of either the Contract Clause or the Due Process Clause through retroactive application of the 1992 amendment, we affirm the judgment of the district court.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-93-260

HONEYWELL INC., and the HONEYWELL PENSION & RETIREMENT COMMITTEE on their own behalf and on behalf of the Honeywell Retirement Investment Plan, INVESTMENT PLUS PLAN of HONEYWELL, INC., and the HONEYWELL RETIREMENT SAVINGS PLAN, and FIRST TRUST NATIONAL ASSOCIATION,

Plaintiffs,

v.

MINNESOTA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION,

Defendant.

MEMORANDUM OPINION AND ORDER

INTRODUCTION

Plaintiffs Honeywell Inc. and the Honeywell Pension & Retirement Committee on their own behalf and on behalf of the Honeywell Retirement Investment Plan, Investment Plus Plan of Honeywell, Inc., and the Honeywell Retirement Savings Plan, and First Trust National Association (collectively "Honeywell") commenced this action seeking declaratory and injunctive relief in connection with a claim Honeywell filed with the Minnesota Life and Health Insurance Guarantee Association ("the Association"). Honeywell claimed payment from the Association for obligations owed by Executive Life Insurance

Corporation ("ELIC") under Guaranteed Investment Contracts ("GICs"), purchased to fund Honeywell's retirement and pension plans.

In 1993, both parties moved for summary judgment on the issue of the Association's payment obligations under 1992 amendments to the Minnesota Life and Health Insurance Guarantee Association Act. The Court granted Honeywell's motion as to Counts III, IV, V and VI and otherwise denied the motion. The Court also granted the Association's motion for summary judgment as to the claim that the 1992 amendment to Minnesota Statute section 61B.06, subd. 7(a) is valid, and in all other respects denied the motion.

By Order dated December 6, 1993, the Court vacated the portion of its previous order granting partial summary judgment to Honeywell, and denied without prejudice Honeywell's and the Association's cross-motions for summary judgment on Counts III, IV, V and VI.[1]

The Court then certified two questions to the Minnesota Supreme Court, staying all proceedings pending resolution of those questions. Following the supreme court's decision on the certified questions, the parties again filed cross-motions for summary judgment. Those motions are now before the Court.

BACKGROUND

I. The Act and the Amendment

The Minnesota Life and Health Insurance Guarantee Association Act ("the Act") created the Association as a mechanism to guaranty the obligations of insolvent insurers for the protection of the public. Minn. Stat. § 61B.01-.16 (1992). The Association is funded with

[1] The amendment to section 61B.06, subdivision 7(a) (the "subrogation amendment") was upheld in this Court's September 22, 1993 Order. This ruling was not vacated by the Court and remains the law of the case.

premiums paid by member insurers, who must join the Association as a prerequisite to transacting insurance business in Minnesota.

Pursuant to the Act, when a foreign insurer is placed under an order of liquidation, rehabilitation, or conservation, the Association

> shall, subject to any conditions imposed by the association and approved by the commissioner, guarantee, assume or reinsure, or cause to be guaranteed, assumed, or reinsured, the covered policies of residents, and shall make or cause to be made prompt payments of the impaired insurer's contractual obligations which are due and owing to residents.

Minn. Stat. § 61B.06, subd. 2. The Act defines "resident" as "any person who resides in this state at the time the impairment is determined and to whom contractual obligations are owed." *Id.* § 61B.03, subd. 13. The term "person" is defined as "any individual, corporation, partnership, association or voluntary organization." *Id.* § 61B.03, subd. 12. Prior to 1992, the Act defined "contractual obligation" as "any obligation owed under covered policies." *Id.* § 61B.03, subd. 5.

The dispute in this case centers on the Minnesota Legislature's 1992 amendment of the term "contractual obligation" ("the Amendment"). As amended, "contractual obligation" means

> (a) . . . any obligation under covered policies, except as provided in subparagraphs (c) and (d) of this subdivision.
>
> (b) For purposes of this chapter, contractual obligation includes an unallocated annuity contract which funds a qualified defined contribution pension plan pursuant to Internal Revenue Code of 1986, sections 401(k), 403(b) and 457.[2]

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[2] The GICs purchased to fund Honeywell's pension plans are a type of "unallocated annuity contract" included in the Association's

> (c) Notwithstanding the definition of contractual obligation contained in paragraphs (a) and (b), *contractual obligation does not include any obligation to nonresident participants of a covered plan or to the plan sponsor, employer, trustee, or other party who owns the contract; in such cases, the association is obligated under this chapter only to participants in a covered plan who are residents of the state of Minnesota on the date of impairment.*

1992 Minn. Laws, ch. 540 (emphasis added). The legislature explicitly provided for retroactive application of the Amendment. 1993 Minn. Laws, ch. 540, § 23.

II. The Dispute

In 1988, Honeywell, on behalf of certain retirement and pension plans, invested in GICs issued by ELIC. The assets of the pension plans were owned by a trustee, as required under the Employee Retirement Income Security Act of 1974 ("ERISA"). At all times relevant to this action, IDS Bank and Trust Company ("IDS") served as trustee for the plans, thus owning all ELIC GICs purchased by Honeywell.

In April, 1991, the California Insurance Commissioner placed ELIC into conservatorship. As a result, the pension plan assets invested in ELIC's GICs are currently and indefinitely unavailable to the participants in Honeywell's plans.

On January 10, 1992, Honeywell claimed coverage by the Association for the ELIC GICs. The Association did not respond to this claim. Subsequently, in April 1992, the Amendment to the Act was signed into law. The Amendment negatively affected Honeywell's pending claim for payment under the Act, as it excludes from

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contractual obligations under the Act. *See Minnesota Life & Health Ins. Guar. Ass'n v. Department of Commerce*, 400 N.W.2d 769, 770, 774 (Minn. Ct. App. 1987).

coverage by the Association the contractual obligations owed to a trustee who owns the contract. Honeywell claims that retroactive application of the Amendment to defeat its pending claim against the Association violates the Contract and Due Process Clauses of the federal and state constitutions.

III. Certification to the Minnesota Supreme Court

The Court initially agreed with Honeywell that retroactive application of the Amendment was unconstitutional. The Court concluded that prior to the 1992 Amendment Honeywell had a vested right in coverage under the Act which could not be defeated retroactively. The Court therefore granted summary judgment to Honeywell on its constitutional claims in its September 22, 1993 Order. Subsequently, the Court vacated that Order and denied without prejudice the parties' cross-motions for summary judgment.

Finding that the action involved questions of Minnesota law which could be determinative of the matter, the Court then certified the following two questions to the Minnesota Supreme Court:

> 1) Did the 1992 amendment to the Act's definition of "contractual obligation," to wit:
>
> > c) Notwithstanding the definition of contractual obligation contained in paragraphs (a) and (b), contractual obligation does not include any obligation to nonresident participants of a covered plan or to the plan sponsor, employer, trustee, or other party who owns the contract; in such cases, the association is obligated under this chapter only to participants in a covered plan who are residents of the state of Minnesota on the date of impairment * * *
>
> 1993 Minn. Laws, ch. 540 § 5(c), *codified at* Minn. Stat. § 61B.03, subd. 5(c) (1992), clarify the Asso-

ciation's coverage obligations under the Act or effect a substantive change in those obligations?

2) Is the right to payment created in favor of annuity contract owners in Minn. Stat. § 61B.06, subd. 2 a purely "statutory" right or a right that is "contractual" in nature?

In addressing whether the Amendment effected a substantive change in the law, the supreme court first analyzed the pre-Amendment obligations of the Association. The court began with the requirement of the pre-1992 Act that the Association guarantee the covered policies of residents. *Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Ass'n.*, 518 N.W.2d 557, 561 (Minn. 1994). The court noted that unallocated annuity contracts are covered policies under the Act. Under ERISA, the unallocated annuity contracts must be held by a plan trustee. The GICs issued on behalf of Honeywell explicitly provide that the trustee, IDS, "owns" the contracts. *Id.* Further, the court found, the Act defines "resident" as a person who resides in the state at the time of the impairment; "person" in turn is defined broadly to include a corporation. Thus, the supreme court held, prior to 1992 the Act unambiguously required the Association to provide coverage to resident trustees, such as IDS, who own unallocated annuity contracts, such as GICs. *Id.*

The supreme court then compared the language of the 1992 Amendment, finding that it obligated the Association to provide coverage "solely to resident plan participants who are the beneficiaries of unallocated annuity contracts." *Id.* at 562. The court concluded that the Amendment, which expressly excludes from coverage a trustee who owns the annuity contract, effected a substantive change in the Act. *Id.*

The supreme court next addressed the question of whether the right of payment in favor of annuity contract owners under the Act is a purely statutory right or is con-

tractual in nature. The court held that any rights of an annuity contract owner against the Association are purely statutory. *Id.* at 563. The court noted that the Association's obligations under the Act are not coextensive with the contractual obligations of the insolvent insurer. Further, as opposed to a voluntary assumption of obligations in the nature of a contract, the Act requires member insurers to join the Association as a condition of doing business in the state. Therefore, the court concluded, the rights of annuity contract owners in Minnesota against the Association are solely statutory. *Id.*

Upon resolution of these questions by the Minnesota Supreme Court, Honeywell and the Association again moved for summary judgment on the constitutionality of the 1992 Amendment.

DISCUSSION

I. Legal Standard

Under Federal Rule of Civil Procedure 56, a moving party is entitled to summary judgment if the evidence shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). If, based upon the evidence, a reasonable jury could not return a verdict for the non-moving party, summary judgment is appropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). As with the parties' initial cross-motions, the issues presently to be decided on summary judgment are questions of law. Determination of the constitutionality of the 1992 Amendment to the Act will resolve the central dispute in this case.

II. Due Process

Economic legislation carries a presumption of constitutionality; the "burden is on one complaining of a due process violation to establish that the legislature has acted

in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). The highly deferential standard accorded economic legislation applies equally to the retroactive application of a statute. *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). As the Supreme Court has stated, "[p]rovided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *Id.* Although the retroactive application of a statute must satisfy the due process test, "that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative basis." *Id.* at 730.

A. Vested or Inchoate Rights

Honeywell contends that even under this deferential standard, retroactive application of the Amendment violates due proces because it divests Honeywell of private vested rights.

Typically, rights in an existing law remain inchoate and do not vest prior to final judgment. *Holen v. Minneapolis-St. Paul Metro. Airports Comm'n*, 84 N.W.2d 282, 287 (Minn. 1957); *McClelland v. McClelland*, 393 N.W.2d 224, 227 (Minn. Ct. App. 1986), *rev. denied*, (Minn. 1986). As the Minnesota Supreme Court stated in *Holen*,

> When the legislature changes the law while a case is pending, but prior to the rendition of judgment, the court may not perpetuate the old law but must apply the new. There is no vested right in an existing law nor in an action until *final* judgment has been entered therein. An appeal suspends a judgment and deprives it of its finality, and that lack of finality continues until the appeal is dismissed or until the appellate court has pronounced its decision. Since a court has no power to perpetuate a rule of law which

> the legislature has either changed or repealed, it follows that amendatory or curative legislation, though enacted after the rendition of a judgment and pending the appeal, must govern the final disposition of the case upon appeal.

Id. In certain cases, however, rights created by statute "vest" regardless of whether final judgment has been entered and cannot be abridged by the retroactive application of a statute. *Hammond v. United States*, 786 F.2d 8, 11 (1st Cir. 1986). Such a situation arises, as Honeywell contends happened here, where contractual rights vest in a party independent of the statute which created them. Contractual rights which fully have accrued may not be divested by subsequent legislation. *Coombes v. Getz*, 285 U.S. 434, 442 (1932).

The *Coombes* case, heavily relied upon by Honeywell, involved an amendment to a state constitution during the pendency of an appeal. The amendment repealed a provision of the constitution imposing liability upon corporate directors for the misappropriation of money by officers of the corporation. *Id.* at 435. The repeal defeated Coombes' cause of action, which had not been perfected by final judgment. The United States Supreme Court held that the constitutional rule of law had created contractual liability independent of the provision which created the law. This contractual right had vested prior to the repeal and could not retroactively be destroyed. *Id.* at 442.

In contrast to the plaintiff in *Coombes*, Honeywell had no vested right to coverage under the Act prior to the 1992 Amendment. The Minnesota Supreme Court explicitly held, and this Court concurs, that any rights held by Honeywell against the Association were purely statutory. *Honeywell*, 518 N.W.2d at 563. The Association's payment and guarantee obligations arise solely from the Act. Significantly, these statutory obligations are not coextensive with the contractual obligations of the insolvent insurer. Section 61B.06, subd. 2 of the Act provides that

the Association's responsibilities are "subject to any conditions imposed by the association and approved by the commissioner." Further, the Act limits the Association's aggregate liability and the Commissioner may reduce the Association's statutory obligations. Minn. Stat. § 61B.06, subd. 8 and 3. Here, unlike the voluntary acts involved by the parties in *Coombes*, "[n]o act was contemplated on [the Association's] part by way of assumption of an obligation in order to fix the liability." *See Coombes*, 285 U.S. at 448. Rather, the Act mandated the Association members to join the Association as a requirement of transacting insurance business in Minnesota. The accompanying obligations were statutorily imposed. *Honeywell*, 518 N.W.2d at 563.

Because Honeywell's rights arose exclusively from the Act and did not "stand independent of the statute that created them," they had not "vested" prior to the 1992 Amendment. *Hammond*, 786 F.2d at 11. Thus, the rights against the Association remained inchoate pending final judgment. *See Id.* at 12 (" 'No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit.' . . . This is true after suit has been filed and continues to be true until a final, unreviewable judgment is obtained.") (quoting *New York Central R.R. Co. v. White*, 243 U.S. 188, 198 (1917)). *See also In re Q Petroleum*, 498 N.W.2d 772, 782 (Minn. Ct. App. 1993) (amendment retroactively removing right of insured persons to recover cleanup costs from the Petroleum Tank Release Cleanup Account did not impair vested rights in violation of Due Process Clause); *Zucker v. United States*, 758 F.2d 637, 639 (Fed. Cir.) (no legitimate claim to retirement benefits which are dependent on a statutory right), *cert. denied*, 474 U.S. 842 (1985).

The Court's conclusion that Honeywell had no vested rights against the Association is supported by several post-*Coombes* decisions upholding legislation which retroactively abridged economic rights created by statute.

In *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, for example, the Supreme Court upheld legislation which retroactively penalized employers who withdrew from multiemployer pension plans. 467 U.S. at 734. The Multiemployer Pension Plan Amendments Act ("MPPAA") created the Pension Benefit Guaranty Corporation ("PBGC") to provide benefits to pension plan participants whose plans terminate with insufficient funds to pay the expected benefits. Prior to the enactment of the statute, certain provisions took effect which imposed liability upon employers withdrawing from multiemployer pension plans. *Id.* at 720-25.

The plaintiff employer argued that retroactive withdrawal liability violated the Due Process Clause. The Supreme Court, noting the strong deference accorded economic legislation, upheld the retroactive application against the constitutional challenge. The Court found the retroactive application justified by the rational legislative purpose of dissuading employers from withdrawing from the pension plans and thus protecting the stability of the plans themselves. *Id.* at 730-31. The Court stated, " 'our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. . . . This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.' " *Id.* at 729-30 (quoting *Usery*, 428 U.S. at 15-16). *See also General Motors Corp. v. Romein*, 112 S. Ct. 1105, 1112 (1992) (upholding against Due Process and Contract Clause challenges a retroactive provision requiring employers to reimburse employees for disability benefits withheld prior to the statute's effective date).

Because Honeywell held no vested rights against the Association prior to the 1992 Amendment, the retroactive application of the Amendment will not be held to violate due process if it was supported by a rational legislative purpose.

B. Rational Legislative Purpose

Honeywell argues that even if its rights had not vested prior to the Amendment, the Amendment still violates due process because it was arbitrary and irrational. As stated above, economic legislation, including the retroactive application of a statute, carries a presumption of constitutionality and will be upheld if it serves a legitimate legislative purpose furthered by rational means. *Gray*, 467 U.S. at 729. The Association contends that the Minnesota Legislature passed the 1992 Amendment to avoid an unanticipated consequence of the Act in the context of unallocated annuity contracts. Specifically, the Association argues, the Amendment sought to protect resident plan participants and avoid an unintended windfall for non-residents in the application of the Act to pension GICs. Several Supreme Court cases are instructive in determining whether the Amendment served a rational legislative purpose.

Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 113 S. Ct. 2264 (1993), involved the same employer withdrawal liability imposed by the Multiemployer Pension Plan Amendments Act at issue in *Gray*. The MPPAA imposed liability on employers withdrawing from a multiemployer pension plan for a share of the plan's unfunded vested benefits. Concrete Pipe argued that because none of its employees had earned vested benefits through Concrete Pipe prior to its withdrawal from the plan, the liability for the unfunded vested benefits lacked a rational relationship to its past contributions. *Id.* at 2287.

The Court upheld the legislation, stating, "under the deferential standard of review applied in substantive due process challenges to economic legislation there is no need for mathematical precision in the fit between justification and means." *Id.* at 2288. *See also United States v. Carlton*, 114 S. Ct. 2018, 2023 (1994) (upholding retroactive tax legislation, which altered taxpayer's expectations,

adopted as a curative measure for significant and unanticipated revenue loss under the pre-amendment tax code).

In the present case, the 1992 Amendment satisfies the due process requirement of rationality. The legislature amended the Act to assure protection for Minnesota resident plan participants. As the Minnesota Supreme Court found, "[g]iven that unallocated annuity contracts were not prevalent at the time of the statute's enactment in 1977, the legislature likely did not contemplate how the Act specifically applied to these contracts." *Honeywell*, 518 N.W.2d at 561. The Amendment sought to cure an unanticipated result of the Act. Providing coverage based on the residency of plan participants is a rational means to effectuate the purposes of the Act in the context of the unanticipated pension GICs. Because the Amendment served a legitimate legislative purpose furthered by rational means, the Court holds that the 1992 Amendment to the Act does not violate the Due Process Clause.

III. Contract Clause

Honeywell also contends that the 1992 Amendment impairs its contractual rights in violation of the Contract Clause of the United States and Minnesota Constitutions.[3] The Contract Clause prohibition against the impairment of contracts is not absolute, but "must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410 (1983) (citations omitted).

To determine whether a state law violates either the state or federal Contract Clause, courts apply the three-part test articulated in *Energy Reserves, supra.* The

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[3] Article I, section 10 of the United States Constitution provides, "No state shall . . . pass any . . . Law impairing the Obligation of Contracts." Article I, section 11 of the Minnesota Constitution provides, "No . . . law impairing the obligation of contracts shall be passed . . . ."

threshold inquiry is " 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.' " *Id.* at 704 (*quoting Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978)). This inquiry, in turn, has three elements: "whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Romein*, 112 S. Ct. at 1109.

The Court need only address the first element, whether a contractual relationship exists, as it is dispositive of this issue. *See id.* at 1110. Upon certification by this Court, the Minnesota Supreme Court answered this precise question in the negative: "There exists no contractual relationship between the Association and the annuity contract owners." *Honeywell*, 518 N.W.2d at 563. Although Honeywell correctly points out that whether a contractual relationship exists for purposes of Contract Clause analysis is ultimately a question for this Court, we " 'accord respectful consideration and great weight to the views of the State's highest court.' " *Romein*, 112 S. Ct. at 1110 (quoting *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938)).

As discussed in connection with the due process inquiry concerning vested rights, *supra* pp. 9-13, the Court concurs with the conclusion of the Minnesota Supreme Court that Honeywell's rights under the Act were purely statutory. As noted earlier, the Association's obligations under the statute were not coextensive with those of the insurer whose contractual obligations it assumed. At issue is not the original contract between insurer and insured, but rather the relationship between the Association and the annuity contract owners. The rights and obligations of those parties are created and governed exclusively by statute. As stated by the supreme court, "[t]o the extent an annuity contract owner enjoys any rights against the Association, it is because they are set forth in a statute." *Honeywell*, 518 N.W.2d at 563.

Accordingly, because no contract existed between Honeywell and the Association, the 1992 Amendment did not substantially impair a contractual relationship in violation of the Contract Clause.

CONCLUSION

Based upon the foregoing and upon all files, records and proceedings herein, the Court holds that the 1992 Amendment to the Minnesota Life and Health Insurance Guaranty Act, Minn. Stat. § 61B.03, subd. 5(c), is constitutional and enforceable. Under the Act, the Association is obligated to guaranty ELIC's obligations to the individual participants in defined contribution pension plans who were residents of Minnesota at the time of ELIC's impairment, December 6, 1991.

Accordingly, IT IS ORDERED THAT Minnesota Life and Health Insurance Guaranty Association's motion for summary judgment (Doc. No. 61) is GRANTED; Honeywell's motion for summary judgment (Doc. No. 68) is DENIED; and its complaint DISMISSED WITH PREJUDICE.

The Association additionally has a subrogation claim pending against Honeywell's fiduciaries, which was stayed by stipulation of the parties pending resolution of this motion. The Court's order granting summary judgment to the Association on the constitutional claims, therefore, does not dispose of all claims in this action. Pursuant to Rule 54(b), Federal Rules of Civil Procedure, the Court expressly determines that there is no just reason for delay and expressly directs the Clerk of Court to enter judgment in accordance with the foregoing Memorandum Opinion.

Dated: February 27, 1995.

/s/ Richard H. Kyle
RICHARD H. KYLE, Judge
United States District Court

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Case No. 3-93-260

HONEYWELL INC., AND THE HONEYWELL PENSION & RETIREMENT COMM., INVESTMENT PLUS PLAN OF HONEYWELL AND THE HONEYWELL RETIREMENT SAVINGS PLAN AND FIRST TRUST NATIONAL ASSOC.

v.

MINNESOTA LIFE AND HEALTH INS GUARANTY ASSOC.

JUDGMENT IN A CIVIL CASE

( ) Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(X) Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Minnesota Life and Health Insurance Guaranty Assoc's motion for summary judgment is GRANTED; Honeywell's motion for summary judgment is DENIED; and its complaint Dismissed with prejudice. The Court's order granting summary judgment to the Association on the constitutional claims, therefore, does not dispose of all claims in this action.

DATED: February 27, 1995

FRANCIS E. DOSAL
Clerk

By /s/ Patricia Kegley
PATRICIA KEGLEY
Deputy Clerk

APPENDIX E

SUPREME COURT OF MINNESOTA

No. C1-93-2470

HONEYWELL, INC., *et al.*,
Plaintiffs,

v.

MINNESOTA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION,
Defendant.

June 30, 1994

OPINION

TOMLJANOVICH, Justice.

The United States District Court, District of Minnesota, Third Division has certified to this court, pursuant to Minn.Stat. § 480.061 (1992), two questions of law pertaining to the effect of a 1992 amendment to the Minnesota Life and Health Insurance Guarantee Association Act, Minn. Stat. §§ 61B.01-.16 (1992). We answer the first certified question by holding that the 1992 amendment to the Act's definition of "contractual obligation" effects a substantive change in those obligations, and answer the second certified question by holding that the right to payment created in favor of annuity contract owners in Minn. Stat. § 61B.06, subd. 2 is a purely statutory right under state law.

The federal district court based the questions certified upon the entire record in this matter and upon the following statement of facts:

> The plaintiffs in this action are Honeywell Inc. and the Honeywell Pension & Retirement Committee, on their own behalf and on behalf of the Honeywell Retirement Investment Plan, Investment Plus Plan of Honeywell Inc. and the Honeywell Retirement Savings Plan, and First Trust National Association (collectively "Honeywell"). The defendant is the Minnesota Life and Health Insurance Guaranty Association ("the Association"); the Association was created pursuant to the Minnesota Life and Health Insurance Guaranty Association Act (the "Act"), Minn.Stat. § 61B.01-.16 (1992), and is comprised of entities authorized to transact insurance in Minnesota or any other kind of business to which the Act applies.[1] The Association is controlled by a nine-member Board of Directors selected by Association members and approved by the Commissioner of Commerce of the State of Minnesota.[2] *Id.* §§ 61B.03, subd. 14 & 61B.04-.05, subd. 1.
>
> *The Act and the 1992 Amendment*
>
> Under the Act, where a foreign insurer is placed under an order of liquidation, rehabilitation, or conservation, the Association
>
> > shall, subject to any conditions imposed by the association and approved by the commissioner, guarantee, assume or reinsure, or cause to be guaranteed, assumed, or reinsured, the covered policies of *residents*, and shall make or cause

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[1] Insurers are required to join the Association as a condition of receiving authority to transact insurance in Minnesota. Minn.Stat. § 61B.04 (1992).

[2] The Commissioner has general supervisory authority over the Association.

> to be made prompt payments of the impaired insurer's contractual obligations which are due and owing to *residents*.

Minn.Stat. § 61B.06, subd. 2 (emphasis added). The term "resident" is defined as "any *person* who resides in this state at the time the impairment is determined and to whom contractual obligations are owed." *Id.* § 61B.03, subd. 13 (emphasis added). The term "person" means "any individual, corporation, partnership, association or voluntary organization." *Id.* § 61B.03, subd. 12. Finally, prior to 1992, the term "contractual obligation," was defined as "any obligation owed under covered policies." *Id* § 61B.03, subd. 5. Under the Act, then, all residents are persons, but not all persons are residents; a person to whom an insurer does not owe a contractual obligation is not a resident for purposes of the Association's guarantee and payment obligations.

The dispute in this action arises out of a 1992 amendment to the definition of "contractual obligation";[3] the Amendment was one of a number of amendments to the Act which were enacted in 1992.[4] *See* 1992 Minn.Laws, ch. 540. As amended, "contractual obligation" means, in pertinent part:

> (a) "contractual obligation" means any obligation under covered policies, except as provided

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[3] Hereafter, the amendment to the definition of "contractual obligation" will be referred to as "the Amendment."

[4] The Act was originally enacted in 1977. 1977 Minn.Laws, ch. 273, and was amended several times during the years 1980 to 1992.

In 1993, the Minnesota Legislature reworked the Act, repealing Minn.Stat. §§ 61B.01-.16 and replacing them with Minn.Stat. §§ 61B.18-.32. 1993 Minn.Laws, ch. 319. The legislature provided that the 1993 amendments would apply prospectively; it further provided that the Association's obligations, as they relate to the Executive Life Insurance Corporation ("ELIC") rehabilitation, are governed by Minn.Stat. §§ 61B.01-.16. *Id.* § 19.

in subparagraph (c) and (d) of this subdivision.

(b) For purposes of this chapter, contractual obligation includes an unallocated annuity contract which funds a qualified defined contribution pension plan pursuant to Internal Revenue Code of 1986, sections 401(k), 403(b), and 457.

(c) Notwithstanding the definition of contractual obligation contained in paragraphs (a) and (b), contractual obligation does not include any obligation to non-resident participants of a covered plan or to the plan sponsor, employer, trustee, or other party who owns the contract; in such cases, the association is obligated under this chapter only to participants in a covered plan who are residents of the state of Minnesota on the date of impairment.

Id. The legislature specifically provided that the Amendment was to apply retrospectively. 1992 Minn.Laws ch. 540 § 23. The 1992 amendments to the Act were presented to the Governor on April 17, 1992 and signed into law on April 27, 1992.

The Dispute Between Honeywell and the Association

In early 1988, Honeywell, on behalf of one of its pension plan funds, the Fixed Income Fund, invested in guaranteed investment contracts [5] ("GICs") issued

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[5] Typically, GIC's are issued for a term of four to five years and bear a fixed rate of interest. GIC's are, theoretically, risk-free investments, as the issuer guarantees the safety of the principal and provides a predictable return on the amount invested.

GIC's are a variety of "unallocated annuity contracts." *Minnesota Life & Health Ins. Guar. Ass'n v. Department of Commerce*, 400 N.W.2d 769, 770, 774 (Minn.App.1987). As a result, section 61B.03, subd. 5(b) specifically provides that "contractual obligation" includes GIC's which fund pension plans such as the Plans.

by Executive Life Insurance Corporation ("ELIC"), a California insurer. As is generally required by ERISA, the assets of the Plans are owned by a trustee. 29 U.S.C. § 1103(a). At all times relevant to this action, IDS Bank and Trust Company ("IDS") was the trustee.[6] Under ERISA then, all ELIC GIC's purchased by Honeywell were owned by IDS as trustee for the Plans.

On April 11, 1991, the California Insurance Commissioner placed ELIC into conservatorship. As a result of the conservatorship, the portion of the Fixed Income Fund assets invested in ELIC GIC's has been "isolated," that is, segregated from the other assets of the Fixed Income Fund; those monies are not available, for any purpose, to participants in the Fixed Income Fund. The conservatorship proceedings have impacted participants because they cannot transfer the amount of their contributions in ELIC to other, more secure, investments. Currently, ELIC is undergoing a "rehabilitation" process, under which the affected participants may eventually recoup all or a portion of the assets currently isolated.

By letter dated January 10, 1992, Honeywell's Pension and Retirement Committee claimed coverage under the Act for the ELIC GIC's.[7] The Association neither denied nor granted this claim; however, following the enactment of the Amendment, the Association has taken the position that it is only required to guarantee and pay the losses incurred by individual plan participants who resided in Minnesota when ELIC was determined to be impaired; thus, the passage of the Amendment impacted, negatively, Honeywell's pending claim for coverage.

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[6] On February 8, 1993 First Trust Company, of St. Paul, Minnesota, was appointed successor trustee to IDS.

[7] Because ELIC is a "foreign" insurer for purposes of the Act, the Association's coverage obligations, if any, are governed by Minn.Stat. § 61B.06, subd. 2.

> Honeywell commenced this action on March 11, 1993; it claims that because IDS is a Minnesota "resident" under the Act, the version of the Act in existence prior to the Amendment unambiguously required the Association to guarantee and make good any obligations ELIC owed to IDS, the legal owner of the GIC's. Honeywell contends that because the Association wished to avoid Honeywell's claim, it caused the Minnesota Legislature [to] pass the Amendment. Honeywell further contends that the legislature's retrospective application of the Amendment to defeat its claim violates both the federal and state constitutions.
>
> In its Complaint, Honeywell raises seven claims: Count I—violation of the Act; Count II—breach of contract; Count III—violation of the Contracts Clause of Article I, section 10 [of] the United States Constitution; Count IV—violation of the Contracts Clause of * * * Article 1, section 11 of the Minnesota Constitution; Count V—violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution; Count VI—violation of the Due Process Clause of article 1, section 7 of the Minnesota Constitution; and Count VII—violation of fiduciary duty.

(Order of Certification, Kyle, J., Civil No. 3-93-260, dated Dec. 6, 1993).

The district court certified to this court the following two questions of law:

> 1. Did the 1992 amendment to the Act's definition of "contractual obligation," to wit:
>
> > (c) Notwithstanding the definition of contractual obligation contained in paragraphs (a) and (b), contractual obligation does not include any obligation to non-resident participants of a covered plan or to the plan sponsor, employer,

> trustee, or other party who owns the contract; in such cases, the association is obligated under this chapter only to participants in a covered plan who are residents of the state of Minnesota on the date of impairment * * *

1992 Minn.Laws, ch. 540 § 5(c), *codified at* Minn. Stat. § 61B.03, subd. 5(c) (1992), clarify the Association's coverage obligations under the Act or effect a substantive change in those obligations?

2. Is the right to payment created in favor of annuity contract owners in Minn. Stat. § 61B.06, subd. 2 a purely "statutory" right or a right that is "contractual" in nature?

Id. These questions were certified for review by this court on December 10, 1993.

I

We consider first whether the 1992 amendment ("the Amendment") to the Act's definition of "contractual obligation" clarifies pre-existing law or substantively changes it. Under the Amendment, the Association must provide coverage to resident employees who are the beneficiaries of defined-contribution pension plans funded by unallocated annuity contracts; the Association has no obligation to provide coverage to non-resident employees and has no obligation to provide coverage to plan trustees or plan sponsors. Honeywell claims that the Amendment substantively changed the Association's coverage obligations. We agree.

The version of the Act prior to the Amendment provides that where a foreign insurer is placed under an order of liquidation, the Association

> shall, subject to any conditions imposed by the association and approved by the commissioner, guarantee, assume, or reinsure or cause to be guaranteed, assumed, or reinsured, the covered policies of *resi-*

> *dents*, and shall make or cause to be made prompt payments of the impaired insurer's contractual obligations which are due and owing to residents.

Minn.Stat. § 61B.06, subd. 2 (1990) (emphasis added). The term "resident" is defined as "any *person* who resides in this state at the time the impairment is determined and to whom contractual obligations are owed". Minn. Stat. § 61B.03, subd. 13 (emphasis added). The term "person" is defined as "any individual, corporation, partnership, association or voluntary organization." Minn. Stat. § 61B.03, subd. 12. The term "contractual obligation" is defined as "any obligation under *covered policies*." Minn. Stat. § 61B.03, subd. 5 (emphasis added). The term "covered policy" is defined as "any policy or contract *owned* by a Minnesota resident to which sections 61B.01 to 61B.16 apply, as provided in section 61B.02." Minn.Stat. § 61B.03, subd. 6 (emphasis added). The term "owner" is not defined.

Unallocated annuity contracts, including Guaranteed Investment Contracts ("GIC's"), are ordinarily understood not to be owned by individual employees who are participants in pension plans which invest in these contracts. Rather, these contracts are deemed to be owned by either a plan trustee or a plan sponsor who is the contract holder. *See, e.g.*, Model Life and Health Guaranty Association Act § 5(n) (Nat'l Ass'n of Insurance Comm'rs 1985) (defining unallocated annuity contracts as "any annuity contract or group annuity certificate which is not issued to or owned by an individual"); *Minnesota Life & Health Ins. Guar. Ass'n v. Department of Commerce*, 400 N.W.2d 769, 770 (Minn.App.1987) (defining unallocated annuity contracts as contracts "not issued to or owned by a named individual").[8] The Employee Retirement Income Security Act (ERISA) generally requires

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[8] The court of appeals, in *Minnesota Life* held that unallocated annuities are covered generally under the Act and therefore should be included in the Association's assessment base.

that the assets of unallocated annuity contracts be held by a plan trustee. ERISA provides that the trustee and not plan participants have the sole responsibility to manage and control plan assets. *See* 29 U.S.C. § 1103(a).

The GIC's which Honeywell contends the Association must guarantee (those issued by ELIC to IDS on behalf of Honeywell) expressly provide that IDS, the plan trustee, is the contract owner. Plan participants are defined as "individual[s] on whose behalf the *Owner* will purchase or provide retirement benefits" (emphasis added). These GIC's further provide that "the owner may exercise every contract right and enjoy every contract privilege without the consent of any participant."

We agree with Honeywell that resident trustees who own unallocated annuity contracts are unambiguously entitled to coverage under the terms of the Act prior to the Amendment.[9] Unallocated annuity contracts are "covered policies" under the Act. *Minnesota Life*, 400 N.W.2d 769. The Association is obligated to guarantee the covered policies of residents. A "resident" is a person residing in Minnesota "to whom contractual obligations are owed." A "person" may be a corporation. In the absence of statutory language to the contrary, there can be no doubt that at plan trustee who owns an unallocated annuity contract is a person to whom contractual obligations are owed.

The Association argues that our interpretation of the pre-Amendment Act results in an unintended windfall for non-resident employees who are participants in pension

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[9] The parties debate whether under state trust law pension plan participants might be construed as having an equitable ownership interest in unallocated group annuity contracts. We need not determine here the precise nature of a beneficiary's interest in trust property generally. We simply observe that in the context of an unallocated annuity contract, it is ordinarily understood that the "owner" is the contract holder, not the individual plan participants who are the ultimate beneficiaries of the contract.

plans with a Minnesota trustee. Given that unallocated annuity contracts were not prevalent at the time of the statute's enactment in 1977, the legislature likely did not contemplate how the Act specifically applied to these contracts. We believe the Association's argument that the legislature did not intend to provide coverage to resident plan trustees is misplaced, however, where resident contract owners are plainly entitled to coverage under the Act. *See* Minn.Stat. § 645.16 (1992) ("When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit").

Nothing in the Act prior to its Amendment limits the Association's coverage obligations to natural persons. To the contrary, the term "person" is defined broadly to include corporations, partnerships, associations and voluntary organizations. Moreover, nothing in the Act prior to its Amendment limits an Association's obligation to nonresident beneficiaries of a covered plan.

Providing coverage to resident owners of unallocated annuity contracts is consistent with the Act's stated purpose which is:

> to protect policyowners, death benefit certificate holders, insureds, beneficiaries, annuitants, payees, and assignees of life insurance policies, health insurance policies, annuity contracts, and supplemental contracts, subject to certain limitations against failure in the performance of contractual obligations due to the impairments of the insurer issuing the policies or contracts.

Minn.Stat. § 61B.02, subd. 2. Providing coverage to resident owners of an unallocated annuity contract is also the approach followed by the 1985 National Association of Insurance Commissioners' Model Act and at least 14 states have adopted this version of the Act.[10]

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[10] Alaska Stat. § 21.79.020(a)(2) (1993); Ark. Code Ann. § 23-96-107(a)(2) (Michie 1992); Del.Code Ann. tit. 18, § 4403 (1992);

We also find it significant that the Association prior to 1992 assessed insurers issuing unallocated annuity contracts based upon the amount of premiums received from resident contract owners, not based upon amounts attributable to individual resident beneficiaries.[11] One expects the Association would not have assessed members based upon the amount of premiums received from resident contract owners if it understood coverage obligations to be owed solely to resident plan participants.

We conclude that the 1992 Amendment to the Act's definition of "contractual obligation" substantively changed the Association's coverage obligations. Prior to the Amendment the Association was obligated to provide coverage to resident plan trustees who owned unallocated annuity contracts on behalf of defined contribution pension plans. Following the Amendment's enactment, the Association became obligated to provide coverage solely to resident plan participants who are the beneficiaries of unallocated annuity contracts.

Upon adopting the 1992 Amendment, the legislature specified that it "intended to clarify existing law" and that the Amendment applied retroactively. The Association suggests that we are obligated to defer to the legislature's characterization of the Amendment as a "clarification." We are not. In determining whether an amendment sub-

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Ga.Code Ann. § 33-38-2 (Michie 1990); Ill.Ann.Stat. ch. 215, para. 5/531.03(1)(b) (Smith-Hurd 1994); Iowa Code Ann. § 508C.3 (1994); Mich.Comp. Laws Ann. § 500.7704(1)(b)(2) (West 1993); Miss.Code Ann. § 83-23-205(1)(b) (1991), N.J.Stat.Ann. § 17B.32A-3(a)(2) (West 1994); N.C.Gen.Stat. § 58-62-21(a)(2) (1993); N.D.Cent.Code § 26.1-38.1-01(b) (1993); Ohio Rev.Code Ann. § 3956.04(A)(2) (Anderson 1993); Utah Code Ann. § 31A-28-103(1)(b) (1993); Wash.Rev.Code Ann. § 48.32A.020 (West 1994).

[11] Under Minn.Stat. § 61B.07, member insurers are supposed to be assessed based on a pro rata share of premiums received on "policies covered" relative to total premiums received on business in the state by all assessed member insurers.

stantively modifies prior law, we are not bound by a "clarifying" label, but analyze the intent and purpose of the original statute. *Rural American Bank of Greenwald v. Herickhoff*, 485 N.W.2d 702, 709 (Minn.1992) (Special Concurrence of Justice Simonett).[12] The 1992 legislature is not the interpreter of laws enacted by the 1977 legislature. *See Anderson v. Firle*, 174 Minn. 333, 219 N.W. 284, 285 (1928). If we were always to accept a legislature's characterization of an amendment as a "clarification," we would effectively be abandoning our power to interpret the law.

The Association additionally points to a letter sent on January 21, 1992 from Department of Commerce Assistant Commissioner Rochelle Bergin to the Association which expresses the position that the pre-Amendment Act provides coverage to resident plan participants but not to non-residents. The Association argues that we should defer to the Department of Commerce's interpretation of the statute as expressed in this letter.[13] We are not inclined to give it much weight where the meaning of the statute is unambiguous.

Finally, the Association argues that its position is supported by Minn.Stat. § 61B.06, subd. 8. This section limits the Association's liability to $100,000 in cash values

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[12] Where we have addressed legislative "clarifications," we ordinarily have been concerned with whether an amendment that seeks to "clarify" existing law should be given retroactive effect. *See Rural American Bank of Greenwald v. Herickhoff*, 485 N.W.2d 702, 706-707 (Minn. 1992), *City of Willmar v. Short-Elliott-Hendrickson, Inc.*, 475 N.W.2d 73, 76-77 (Minn.1991) and *Nardini v. Nardini*, 414 N.W.2d 184, 196 (Minn. 1987). Here, the legislature has specifically provided that the "clarifying" amendment should be given retroactive effect. Therefore, we are concerned solely with whether the Amendment is in fact a clarification or whether it is really a substantive modification of prior law.

[13] The Department of Commerce is the administrative agency charged with supervising the Association. *See* Minn.Stat. § 61B.04, subd. 2.

or $300,000 in benefits with "respect to any one life." The Association argues that if a plan trustee is covered under the Act, then the trustee must be the "life" to which the limitation applies. We believe that the per-life limit is plainly inapplicable to a trustee or other non-natural person.

II

The second certified question asks us to consider whether the right to payment in favor of annuity contract owners in Minn.Stat. § 61B.06, subd. 2 is a purely statutory right or a right that is contractual in nature. We hold that the right to payment is a purely statutory right under state law.

Honeywell argues that because the Act requires the Association to "guarantee" or "assume" contractual obligations, the Act creates contractual rights. We disagree. To the extent an annuity contract owner enjoys any rights against the Association, it is because they are set forth in a statute.[14] The Association's statutory obligations are not coextensive with the contractual obligations of a failed insurer. Under Minn.Stat. § 61B.06, subd. 2, the Association's obligations are "subject to any conditions imposed by the association and approved by the commissioner." Under Minn.Stat. § 61B.06, subd. 8, the aggregate liability of the Association is limited. The Commissioner may reduce the Association's obligations under Minn.Stat. § 61B.06, subd. 3.

There exists no contractual relationship between the Association and annuity contract owners. Honeywell argues that it is the third-party beneficiary of a contractual relationship among Association members. No such con-

[14] An annuity contract holder has contractual rights which may be asserted against the insurer, but these contractual rights are unaffected by the Act. Honeywell does not claim that the terms of the Act are an implied term in annuity contracts entered into between the insurer and the contract holder.

tractual relationship exists. Each member insurer is *required* by statute to participate in the Association as a condition of doing business in the state.[15]

Other state courts which have interpreted insurance guaranty association statutes have suggested that rights against guaranty associations are statutory in nature. *See Virginia Property and Casualty Ins. Guar. Ass'n v. International Ins. Co.*, 238 Va. 702, 385 S.E.2d 614 (1989); *Isaacson v. California Ins. Guar. Ass'n*, 44 Cal.3d 775, 244 Cal. Rptr. 655, 750 P.2d 297 (1988); *City of Greensboro v. Reserve Ins. Co.*, 70 N.C.App. 651, 321 S.E.2d 232 (1984). In *City of Greensboro*, for example, the North Carolina Court of Appeals held that prejudgment interest could not be assessed against an insurance guaranty association even though an insolvent insurer might have been liable for it in a breach of contract action. The court held that "the identity of the Association as a statutory creation * * * relieves it from liability for prejudgment interest." 321 S.E.2d at 240.

We answer the first certified question by holding that the 1992 amendment to the Act's definition of "contractual obligation" effects a substantive change in those obligations. We answer the second certified question by holding that the right to payment created in favor of annuity contract owners in Minn.Stat. § 61B.06, subd. 2 is a purely statutory right under state law.

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[15] Honeywell cites *Scobee Combs Funeral Home v. E.F. Hutton & Co.*, 711 F.Supp. 605, 608 (S.D.Fla.1989), which held that a customer was a third-party beneficiary of a National Association of Securities Dealers (NASD) Manual requiring members to arbitrate on demand. *Scobee* is clearly distinguishable from this case, however, because unlike the NASD, the Association is an entity created by statute.

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-93-260

HONEYWELL INC. and the HONEYWELL PENSION & RETIREMENT COMMITTEE on their own behalf and on behalf of the HONEYWELL RETIREMENT INVESTMENT PLAN, INVESTMENT PLUS PLAN of HONEYWELL INC. and the HONEYWELL RETIREMENT SAVINGS PLAN, and FIRST TRUST NATIONAL ASSOCIATION,

Plaintiffs,

vs.

MINNESOTA LIFE and HEALTH INSURANCE GUARANTEE ASSOCIATION,

Defendant.

MEMORANDUM OPINION AND ORDER

Introduction

Plaintiffs Honeywell Inc. and the Honeywell Pension & Retirement Committee, on their own behalf and on behalf of the Honeywell Retirement Investment Plan, Investment Plus Plan of Honeywell Inc. and the Honeywell Retirement Savings Plan, and First Trust National Association (collectively "Honeywell") commenced this action against the defendant Minnesota Life and Health Insurance Guarantee Association (the "Association"); Honeywell seeks declaratory and injunctive relief in connection with a claim it filed with the Association for payment of obliga-

tions owed by Executive Life Insurance Corporation ("ELIC") under Guaranteed Investment Contracts ("GIC's") purchased to fund certain of Honeywell's employee retirement and pension plans (the "Plans"). Before the Court are the parties' cross-Motions for Summary Judgment.

Background

The Act and the 1992 Amendment

The dispute in this action concerns the effect of recent amendments to the Minnesota Life and Health Insurance Guarantee Association Act (the "Act").[1] Minn. Stat. § 61B.01-.16 (1992). The Act created the Association, which is comprised of entities authorized to transact insurance in Minnesota or any other kind of business to which the Act applies.[2] The Association is controlled by a nine-member Board of Directors ("Board"), selected by Association members and approved by the Commissioner of Commerce of the State of Minnesota ("Commissioner").[3] *Id.* §§ 61B.03, subd. 14 & 61B.04-.05, subd. 1.

Under the Act, where a foreign insurer—ELIC is such an insurer—is placed under an order of liquidation, rehabilitation, or conservation, the Association

> shall, subject to any conditions imposed by the association and approved by the commissioner, guaran-

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[1] The Act was originally enacted in 1977. 1977 Minn. Laws, ch. 273, and was amended several times during the years 1980 to 1992. In 1993, the Minnesota Legislature reworked the Act, repealing Minn. Stat. §§ 61B.01-.16 and replacing them with Minn. Stat. §§ 61B.18-.32. 1993 Minn. Laws ch. 319. The amendment specifically provides that it is prospective in application; it further provides that the Association's obligations in the case of ELIC are governed by Minn. Stat. §§ 61B.01-.16. *Id.* § 19.

[2] Insurers are required to join the Association as a condition of receiving authority to transact insurance in Minnesota. Minn. Stat. § 61B.04.

[3] The Commissioner has general supervisory authority over the Association.

> tee, assume or reinsure, or cause to be guaranteed, assumed, or reinsured, the covered policies of *residents*, and shall make or cause to be made prompt payments of the impaired insurer's contractual obligations which are due and owing to *residents*.

Minn. Stat. § 61B.06, subd. 2 (emphasis added). The term "resident" is defined as "any *person* who resides in this state at the time the impairment is determined and to whom contractual obligations are owed." *Id.* § 61B.03, subd. 13 (emphasis added). The term "person" means "any individual, corporation, partnership, association or voluntary organization." *Id.* § 61B.03, subd. 12. Finally, prior to 1992, the term "contractual obligation" was defined as "any obligation owed under covered policies." *Id.* § 61B.03, subd. 5. Under the Act, then, all residents are persons, but not all persons are residents; a person to whom an insurer does not owe a contractual obligation is not a resident for purposes of the Association's guarantee and payment obligations.

In 1992, the Minnesota Legislature amended various provisions of the Act. Laws 1992, ch. 540. Two provisions of those amendments are at issue in this litigation. First, the legislature amended the definition of "contractual obligation."[4] As amended, "contractual obligation" means, in part:

> (a) "contractual obligation" means any obligation under covered policies, except as provided in subparagraphs (c) and (d) of this subdivision.
>
> (b) For purposes of this chapter, contractual obligation includes an unallocated annuity contract which funds a qualified defined contribution pension plan pursuant to Internal Revenue Code of 1986, sections 401(k), 403(b), and 457.[5]

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[4] Hereafter, the amendment to the definition of "contractual obligation" will be referred to as "the Amendment."

[5] GIC's are a variety of "unallocated annuity contracts." *Minnesota Life & Health Ins. Guar. Ass'n v. Department of Commerce,*

> (c) Notwithstanding the definition of contractual obligation contained in paragraphs (a) and (b), contractual obligation does not include any obligation to nonresident participants of a covered plan or to the plan sponsor, employer, trustee, or other party who owns the contract; in such cases, the association is obligated under this chapter only to participants in a covered plan who are residents of the state of Minnesota on the dated of impairment.

Id. The legislature specifically provided that the Amendment was to apply retrospectively. 1993 Minn. Laws, ch. 540, § 23.

Under the amended definition of "contractual obligation," the Act, Minn. Stat. § 61B.06, subd. 2, requires the Association to guarantee and make "prompt payment" of an insurer's contractual obligations under an unallocated annuity contract—for example, a GIC—which funds a qualified pension plan. However, as to such contracts, the Association is obligated to make prompt payment and guarantee an impaired insurer's contractual obligations *only* to persons who are *both* (1) plan *participants* and (2) Minnesota residents on the date of impairment. The Association does not owe any obligations to either nonresident participants or entities that actually own the GIC which funds a plan.[6] The Amendment, then, both broadened and narrowed the definition of "contractual obligations."[7]

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400 N.W.2d 769, 770, 774 (Minn. Ct. App. 1987). Thus, section 61B.03, subd. 5(b) specifically provides that "contractual obligation" includes GIC's which fund pension plans such as the Plans.

[6] Although the Amendment does not define the term "covered plan," the only reasonable conclusion is that the term refers to a "qualified defined contribution pension plan pursuant to Internal Revenue Code of 1986, sections 401(k), 403(b), and 457," which appears in section 61B.03, subd. 5(b).

[7] Because the term "contractual obligation" specifically excludes obligations owed to either non-resident participants or non-participant owners of contracts funding pension plans, those categories of "persons" are not "residents" under Minn. Stat. § 61B.03,

The legislature also amended section 61B.06, subdivision 7,[8] which provides the Association with certain subrogation rights, including the right to require that a person receiving benefits under the Act assign certain rights and causes of action to the Association.[9] Section 61B.06, subdivision 7 now provides:

> (a) A person receiving benefits under sections 61B.01 to 61B.16 shall be considered to have assigned rights under, and any causes of action relating to, the covered policy or contract to the association to the extent of the benefits received because of sections 61B.01 to 61B.16,, whether the benefits are payments of or on account of contractual obligations or continuation of coverage, or provision of substitute or alternative coverages. The association may require

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subd. 13; they are not persons "to whom contractual obligations are owed under covered policies." Accordingly, the policies or contracts owned by such persons are not "covered policies" for purposes of the Association's obligations under § 61B.06, subd. 2. *See* Minn. Stat. § 61B.03, subd. 6 ("covered policy" means "any policy or contract owned by a Minnesota *resident*"). The Amendment, therefore, had the curious, and likely unintended, effect of removing such contracts from the Act's protection.

[8] Hereafter, the amendment to § 61B.06, subd. 7 will be referred to as "the Subrogation Amendment."

[9] Prior to the Amendment, § 61B.06, subd. 7 provided:

> Assignment, subrogation. (a) Any person receiving benefits under sections 61B.01 to 61B.16 shall be deemed to have assigned rights under the covered policy to the association to the extent of the benefits received, whether the benefits are payments of contractual obligations or continuation of coverage. The association may require an assignment to it of the rights by any payee, policy or contract owner, beneficiary, insured or annuitant as a condition precedent to the receipt of any rights or benefits conferred by sections 61B.01 to 61B.16 upon the person. The association shall be subrogated to these rights against the assets of any impaired insurer.
>
> (b) the subrogation rights of the association under this subdivision shall have the same priority against the assets of the impaired insurer as that of the person entitled to receive benefits.

> an assignment to it of those rights and causes of action by a payee, policy or contract owner, beneficiary, insured, or annuitant as a condition precedent to the receipt of any rights or benefits conferred by sections 61B.01 to 61B.16 upon that person. *The subrogation rights of the association include any rights that a person may have as a beneficiary of a plan covered under the Employee Retirement Income Security Act of 1974, United States Code, title 29, section 1003, as amended through December 31, 1991* [hereinafter "ERISA"].
>
> * * *
>
> (c) *In addition to paragraphs (a) . . . the association has all common law rights of subrogation and other equitable or legal remedies that would have been available to the impaired or insolvent insurer or holder of a policy or contract with respect to that policy or contract.*

Id. §§ 61B.06, subd. 7(a) & (c) (emphasis added). The Subrogation Amendment was also given a retrospective application. 1993 Minn. Laws, ch. 540, § 23.

For purposes of this action, the chief effects of the Subrogation Amendment were to (1) expressly provide that the Association was subrogated to a plan participant's rights under ERISA, (2) eliminate the provision that the Association was subrogated only to the rights or causes of action a plan participant had against the insurer, and (3) specifically provide, for the first time, that the Association had all of the rights to subrogation and other remedies available to a plan participant under common law.

The Dispute Between Honeywell and the Association

In early 1988, Honeywell, on behalf of the Plans' Fixed Income Plan, invested in GIC's issued by ELIC.[10] As is

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[10] GIC's typically are issued for a term of four to five years and bear a fixed rate of interest. GIC's are, theoretically, risk-free investments, as the issuer guarantees the safety of the principal and provides a predictable return on the amount invested.

generally required by ERISA, the assets of the Plans are owned by a trustee. 29 U.S.C. § 1103(a). At all times relevant to this action, IDS Bank and Trust Company ("IDS") was the trustee.[11] Under ERISA then, all ELIC GIC's purchased by Honeywell were owned by IDS as trustee for the Plans.

On April 11, 1991, the California Insurance Commissioner placed ELIC into conservatorship. As a result of the conservatorship, the portion of Fixed Income Fund assets invested in ELIC GIC's has been "isolated," that is, segregated from the other assets of the Fixed Income Fund, and is not available, for any purpose, to participants in the Plans. The conservatorship proceedings impacted participants because they cannot transfer the amount of their contributions in ELIC to other, more secure, investments. Currently, Executive Life is undergoing a "rehabilitation" process, under which plan participants may eventually recoup all or a portion of the assets currently isolated.

By letter dated January 10, 1992, Honeywell's Pension and Retirement Committee claimed coverage under the Act for the ELIC GIC's. The Association neither denied nor granted this claim. The 1992 amendments to the Act were presented to the Governor on April 17, 1992 and signed by the Governor on April 27, 1992; they impacted, negatively, Honeywell's pending claim before the Association. Honeywell commenced this action on March 11, 1993.

Honeywell claims that because IDS is a Minnesota "resident" under the Act, the version of the Act in existence prior to 1992 required the Association to guarantee and make good any obligations ELIC had to IDS, the legal owner of the GIC's. Honeywell contends that because the Association wished to avoid Honeywell's claim, it had the Minnesota Legislature pass the Amendment. Honey-

[11] On February 8, 1993 First Trust Company, of St. Paul, Minnesota, was appointed successor trustee to IDS.

well alleges that the Amendment is not objectionable in and of itself; however, the legislature's retrospective application of the Amendment to defeat its claim violates both the federal and state constitutions. Honeywell also claims that the Subrogation Amendment is preempted by ERISA.

In its Complaint, Honeywell raises seven claims: Count I—violation of the Act; Count II—breach of contract; Count III—violation of the Contracts Clause of Article 1, section 10 the United States Constitution; Count IV—violation of the Contracts Clause of the Article 1, section 11 of the Minnesota Constitution; Count V—violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution; Count VI—violation of the Due Process Clause of Article 1, section 7 of the Minnesota Constitution; and Count VII—violation of fiduciary duty.

Discussion

I. Standard of Decision

Rule 56 of the Federal Rules of Civil Procedure governs motions for summary judgment. Under that Rule:

> [summary] judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). Summary judgment is to be granted only where the evidence is such that no reasonable jury could return a verdict for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

Ordinarily, the court's task on a motion for summary judgment is to determine whether the record, as identified by the parties, shows the existence of a real controversy

over a material issue, such that the controversy must be resolved by the finder of fact at trial. In this case, both parties have represented to the Court that the issues to be determined on the cross-motions are ready for decision and that they are questions of law. Accordingly, although a decision on the cross-motions will not finally dispose of the litigation, it will resolve the core dispute between the parties.

II. Motion for Summary Judgment on the Amendment

A. Did The Amendment Clarify or Change the Act?

Generally, the adoption of an amendment to a statute raises a presumption that the legislature intended to make some change in the existing law. *Brotherhood of Ry. Clerks v. State by Balfour*, 299 N.W.2d 3, 13 (1975). However, where an amendment is adopted to "clarify" rather than alter the statute, the presumption is rebutted. *State by Spannaus v. Coin Wholesalers, Inc.*, 250 N.W.2d 583, 588 (Minn. 1976). In other words, where an amendment rewords and clarifies the statute, that is, makes clear what the law already is and has been, the statute remains unchanged; thus, there is "really no question of retroactivity to be decided." *Gudvangen v. Austin Mut. Ins. Co.*, 284 N.W.2d 813, 817 (Minn. 1979), *app. dismissed*, 444 U.S. 1062, 100 S. Ct. 1002, 62 L.Ed.2d 745 (1980). Retrospective application of non-clarifying amendments is subject to limitations.[12]

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[12] The parties' citation to cases such as *Rural American Bank v. Herickhoff*, 485 N.W.2d 702 (Minn. 1992), *Nardini v. Nardini*, 414 N.W.2d 184 (Minn. 1987), and *Holman v. All Nation Ins. Co.*, 288 N.W.2d 244 (Minn. 1980) reflects that the parties may be confusing why the clarification question is important in this case. In cases like *Nardini* and *Herickhoff* the issue of clarification was important because ordinarily, a statute is not to be retrospectively applied unless it specifically so states, Minn. Stat. §§ 645.21, 645.31; however, a clarifying amendment is to be read into statutory law retrospectively. Both *Nardini* and *Herickhoff* involved statutes which were silent on retrospectivity. Here, the legislature spe-

Honeywell and the Association disagree as to whether the Amendment merely clarified the Act or whether it worked a substantive change in the Act. However, both parties agree that the relationship between the Act and the Amendment must be determined because if the Amendment merely clarified what the legislature had intended "contractual obligation" to mean from the Act's genesis in 1977, the legislature's retrospective application of the Amendment would pass constitutional muster.[13]

Initially, the Court disagrees with the Association's claim that "[*Rural American Bank v. Herickhoff*, 485 N.W.2d 702 (Minn. 1992)] and the long line of cases coming before it set forth a straight-forward bright-line rule: when a legislature expressly indicates its intent that an amendment to an existing statute is merely a clarification and does not change existing law, the clarification must be applied to cases arising on or before the clarification." [14] (Def's Mem. Supp. Summ. J., at 10.) The decisions of the Minnesota Supreme Court make it clear that this Court is not required to "accept" a later legislature's interpretation of what an earlier legislature intended. Whether an amendment was, in fact, a clarification must be decided by the court, even if the legislature specifically states that the amendment was a clarifying amendment.

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cifically provided for retrospective application. *See* 1993 Minn. Laws, ch. 540, § 23.

[13] The character of the Amendment would not affect the question whether ERISA preempts the Amendment. In fact, given a federal court's obligation to construe a statute so as to avoid a conflict with the federal constitution, the issue of ERISA preemption would precede any analysis of alleged constitutional infirmities.

[14] Apparently, the Association believes that this Court must accept the legislature's statement that the Amendment "clarifies existing law" and infer that the broad definition of "contractual obligation" in section 61B.03, subd. 5 was never intended to include obligations owed to nonresident participants and trustee owners under a GIC which funds a pension plan.

See e.g., Willmar v. Short-Elliott-Hendrickson, 475 N.W.2d 73, 76-77 (Minn. 1991).

Moreover, such a rule would violate the long-standing principle that the "opinion of a subsequent legislature upon the meaning of a statute is entitled to no more weight than that of the same [people] in private capacity," *Bingham v. Supervisors of Winona County*, 8 Minn. 390, 398 (1878), *quoted in Gudvangen*, 284 N.W.2d at 818-19 (Otis, J., dissenting). Finally, it is undisputed that the Association sought the Amendment only after Honeywell asserted its claim to coverage; given this history, deferring to this legislature's use of "clarifying" would be improper.[15] *See Rural American Bank*, at 709-10 (Simonett, J., concurring). Accordingly, standard principles of statutory construction will guide the Court's effort to discern whether the Amendment clarified the definition of "contractual obligation" or effected a substantive change thereof.

Minnesota has established certain directives which are to be used when reviewing statutes, the most basic of which points the court to the language of the statute: "[w]hen the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of a law shall not be disregarded under the pretext of pursuing the spirit." Minn. Stat. § 645.16. The intention of the legislature becomes relevant only if the words of a law are not "explicit." *Id.* Where legislative intent is used to determine a statute's meaning, section 645.16 sets forth certain factors to be considered. In addition, section 61B.02, subdivision 3 provides a specific directive for construing and interpreting the Act, should interpretation be necessary.

The Association contends that the "fundamental issue" before the Court is "in the context of a pension GIC,

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[15] Moreover, permitting legislative bodies to avoid constitutional review by including the word "clarify" in a statute would make a nullity of both due process and the Contracts Clause.

where a trustee holds the GIC strictly in a fiduciary capacity for the benefit of plan participants who invested their funds for the purchase of the GIC, to whom are contractual obligations 'owed' within the meaning of the [Act]?" (Def's Reply Mem. Supp. Summ. J., at 2.) The Association claims that this issue had not been *directly and explicitly* addressed in the Pre-Amendment Act; hence, the precise manner in which the Act addresses pension GIC's was unclear. Accordingly, the Association continues, the Amendment merely clarified an ambiguity which existed in the Act since its passage: that the Association was only obligated to cover the losses of individual plan participants who reside in Minnesota on the date impairment is determined. *See* Minn. Stat. § 61B.03, subd. 5(c). The Court disagrees.

A statute's clarity is not dependent upon the statute addressing every potential factual scenario which may arise under it. Instead, the question asked by Minn. Stat. § 625.16 is whether the statute becomes ambiguous in the context of a specific set of facts. *See Rural American Bank*, 485 N.W.2d at 709 (Simonett, J., concurring). If not, the statute's meaning is clear, even though it may not specifically address the factual context of a given dispute. Thus, the Association incorrectly asserts that the pre-Amendment Act is ambiguous because it did not address the person to whom "contractual obligations" are owed where GIC's are funded by individual pension plan participants.

Under applicable principles of statutory interpretation, the Court concludes that the Amendment effected a substantive change in the Act's definition of "contractual obligation." Under the Act as it existed prior to 1992, corporate trustees that owned unallocated annuity contracts were "residents" if they resided in Minnesota on the date impairment was determined and if contractual obligations were owed to them. Contractual obligations were any obligations owed under "covered policies." At the time Honeywell filed its claim, covered policies were

those policies or contracts owned by a Minnesota resident to which the Act applied. As *Minnesota Life* had determined that the Act applied to GIC's, the language of the Act clearly and unambiguously provided that IDS, as the "person" that owned the GIC's, could call upon the Association to guarantee and make payment of the obligations ELIC owed to IDS under the GIC's.[16] Accordingly, the presumption that the Amendment substantively changed the Act stands unrebutted.[17]

1. The Department of Commerce's "Interpretation"

Even if the Act was ambiguous, nothing offered by the Association demonstrates that earlier legislatures intended the Act to apply only to individual plan participants who reside in Minnesota. First, the Court rejects the Association's contention that it must afford deference and weight to what the Association contends is an interpretation of the Act by the Department of Commerce ("Department"). A January 22, 1992 letter from Assistant Commissioner Rochelle Bergin to Association President Robert J. Hasling, to the effect that the Association is only obligated to make payments to plan participants who are residents of Minnesota, is, the Association argues, a decision or "opinion" by the Department.[18]

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[16] The Court finds no merit in the Association's argument that the *Minnesota Life* court determined only that GIC's were covered under the Act for purposes of assessing member insurers, but not for purposes of determining the Association's coverage obligations. *Minnesota Life* affirmed the Commissioner of Commerce's decision that GIC's were covered under the Act as "annuity contracts." Minn. Stat. § 61B.02, subd. 2. Accordingly, GIC's are contracts to which the Act applies. That fact ends the inquiry.

[17] Once presented with the facts underlying the Honeywell claim, the legislature may have determined to change the Act. That it was entitled to do. However, as a *change* in the Act, the retrospective application of the Amendment is subject to certain limitations.

[18] Department Counsel, Richard S. Gomsrud, states in an affidavit that Honeywell, the Association, and other parties sought a "determination" as to whom coverage obligations were owed with respect

Under the Act, the "Commissioner" is defined as the "Commissioner of Commerce of the State of Minnesota and, in the Commissioner's *absence or disability, a* deputy of the Association, *id.* §61B.04, subd. 2, the Commissioner's place." Minn. Stat. § 61B.03, subd. 14 (emphasis added). In addition to being the immediate supervisor of the Association, *id.* § 61B.04, subd. 2, the Commissioner assumes several other roles in furtherance of its supervisory capacity.[19] The Commissioner also has certain powers and duties which are or may be exercised to effectuate the purposes of the Act.[20]

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to GIC's held by pension plans. Second Gomsrud Aff., ¶ 3. Gomsrud further states that after meeting with representatives of the parties and "carefully considering" their arguments, the Department issued its determination as to the Association's coverage obligations for GIC's. *Id.* ¶¶ 5, 7. In reaching the determination, the Department "gave the same considerations to the parties' positions and relied upon the Department's expertise and experience in interpreting the Act to the same extent it would have in a formal hearing" even though none of the parties had sought a hearing pursuant to the Act. *Id.* ¶ 7.

[19] The Commissioner (1) approves the members of the Association's Board of Directors, id. § 61B.05, subd. 1, 2; (2) approves conditions that the Association places on its guarantee obligations, *id.* § 61B.06, subd. 1, 2; (3) imposes (pursuant to the Association's request) liens, moratoriums, or other similar means to ensure performance of a failed insurer's contractual obligations, *id.* § 61B. 06, subd. 3; (4) requests assistance and advice from the Association, *id.* 61B.06, subd. 5; (5) announces and publishes any changes in the dollar amounts of the Association's aggregate liability, *id.* § 61B.06, subd. 8a; (6) permits the Association to exercise the powers of a domestic life or health insurer, *id.* § 61B.06, subd. 9(a)(7); and (7) approves the Association's plan of operation and promulgates rules and regulations where necessary to effectuate the purpose of the Act, *id.* § 61B.08, subd. 1.

[20] In particular, the Commissioner has the express duty to (1) notify the Board of any impairment; (2) provide the Association with a statement of premiums in the appropriate states for each member insurer; and (3) serve a demand upon an impaired insurer to make good an impairment. *Id.* § 61B.09, subd. 1. The Commissioner also has the power to (1) suspend or revoke the certificate

Upon a review of the Commissioner's powers, duties and obligations under the Act, the Court is unable to discern any provision in the Act which specifically provided the Commissioner with the authority to issue an opinion, decision, or order on the Association's coverage obligations in the absence of an appeal from an action of the Board. There is nothing in the record indicating that Honeywell had appealed from any action; Gomsrud's affidavit indicates that the parties were engaging only in informal discussions. The letter, therefore, was neither an "order" nor a "decision" under the APA.[21] *See* Minn. Stat. § 14.57-.62.

Finally, assuming, *arguendo*, that the Commissioner had the power to issue a binding interpretation of the Association's coverage obligations in situations such as the one at issue here, there has been no showing that *Assistant Commissioner* Bergin had the authority under section 61B.03, subd. 14 to issue that interpretation or opinion.

In summary, whatever the January 14, 1992 letter purports to be, it does not represent an official interpretation of the Act, whether by rule, order, or final action. There-

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of authority to transact insurance of any member insurer and levy forfeitures on any member insurer, *Id.* § 61B.09, subd. 2; (2) review any action of the Board upon appeal (the final action or order of the Commissioner is subject to judicial review under the provisions of Minnesota's Administrative Procedure Act ("APA"), Minn. Stat. § 14.01-.69; and (3) examine and regulate the Association. Minn. Stat. § 61B.13.

[21] Moreover, the January 22, 1992 letter was not a "rule" promulgated pursuant to section 61B.08, subd. 1. There has been no showing that a situation existed permitting the Commissioner to exercise his rulemaking authority under the Act. *See* Minn. Stat. § 61B.08, subd. 1. Further, if the Commissioner had intended that the letter be a "rule," under the APA's definition of that term, Minn. Stat. § 14.02, subd. 4, it was not issued in compliance with the APA's procedures for promulgating (1) rules adopted after a public hearing, *id.* §§ 14.131-.20; (2) rules adopted without public hearing, *id.* §§ 14.22-.29; or (3) emergency rules. *Id.* §§ 14.29-.36.

fore, even if legislative intent was a necessary inquiry in this case, that letter would not be relevant evidence of what the legislature intended.

2. The Role Ownership of the GIC's Plays in Determining Legislative Intent

In 1989, the legislature amended the definition of "covered policy" to mean "any policy or contract *owned by a Minnesota resident* to which sections 61B.01 to 61B.16 apply, as provided in section 61B.02." Minn. Stat. § 61B.03, subd. 6 (1990).[22] The Court also rejects the Association's claim that the 1989 amendment to the term "covered policy" supports its contention that the legislature always intended that the Act protect only individuals who reside in Minnesota (in the case of GIC's which fund pension plans, plan participants who live in Minnesota). (Def's Mem. Supp. Summ. J., at 13. (quoting Sen. Commerce Committee, May 15, 1989, statement of Sen. Luther; H.R. Ins. Committee, May 15, 1989, statement of Rep. Skoglund).

As noted *supra*, the Act defines "resident" as "a person who resides in this state at the time impairment is determined and to whom contractual obligations are owed." Minn. Stat. § 61B.03, subd. 13. IDS is a "person" under section 61B.03, subd. 12 of the Act. It is undisputed that IDS was residing in Minnesota at the time ELIC was determined impaired; hence, because "contractual obligations" meant any obligation owed under covered policies, *id.* § 61B.03, subd. 5, the Association was obligated to guarantee any contractual obligations owed IDS under the GIC's *if IDS "owned" the GIC's.*

That IDS owned the GIC's, albeit for the benefit of the plan participants, is established by *Minnesota Life* and the GIC's themselves. The GIC's identify IDS as "owner,"

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[22] As originally enacted, "covered policy" meant "any policy or contract to which sections 61B.01 to 61B.16 apply, as provided in section 61B.02." Minn. Stat. § 61B.03, subd. 6 (1988).

distinguishing it from "participants," who are the "individual[s] on whose behalf owner will purchase or provide retirement benefits." Ververken Aff., Exh. A, at 4.

Moreover, had the legislature intended to narrow the reach of the Act in the manner asserted by the Association, it could have amended the Act to specifically define "owned" in the context of unallocated annuity contracts generally, or specifically, GIC's which fund pension plans.[23] In the absence of such a definition, the 1989 amendment to "covered policy" had no affect on the Act's application to GIC's owned by a corporate trustee residing in Minnesota. Certainly, the 1989 amendment does not further the Association's argument that the Act originally was intended to apply only to *human beings*.[24]

Moreover, the legislature's use of "own" in the Amendment itself furthers the conclusion that ownership of a GIC lies with the person who has legal title to a policy or contract under the terms of the policy or contract. The Amendment provides that "contractual obligation" does not include "any obligation to the plan sponsor, employer, trustee, or *other party who owns*" an unallocated annuity contract which funds a pension plan. Minn. Stat. § 61B.03, subd. 5(c). If, as the Association argues,

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[23] The Act could have ben amended to define "owned as follows: " 'owned,' in the case of unallocated annuity contracts funding a pension plan, means the beneficial interest held by a plan participant pursuant to their contribution to the plan." Under this definition, a GIC would be a "covered policy" only to the extent of individual plan participants' interest therein. As a result, contractual obligations would be owed only to such persons.

[24] The Court notes that after the 1989 Amendment to the definition of "covered policies," GIC's owned by trustes or other entities that do not reside in Minnesota are not "covered policies" because they are not "owned by a Minnesota resident." *See* Minn. Stat. § 61B.03, subd. 6. The Association, therefore, had no obligation to Minnesota residents who were participants in pension plans funded by such GIC's. However, plan participants residing in Minnesota were covered if their GIC's were owned by entities residing in this state.

ownership lies with the individual participants who contribute funds to the plan, the legislature's use of "own" in the subdivision 5(c) would conflict with subsequent language (in that same subdivision) that the Association owes a contractual obligation to participants who reside in Minnesota. *Id.* In other words, if plan participants "own" GIC's through their beneficial interest in them, subdivision 5(c) would include plan participants in and then exclude them from the definition of contractual obligation. This is an absurd result.

3. Summary

The presumption that the Amendment substantively changed the Act stands unrebutted; thus, it must be applied prospectively in the absence of a statement providing for retrospective application. Minn. Stat. § 645.21. As noted *supra*, the legislature expressly stated that the Amendment was to be applied retroactively. The question thus becomes whether retrospective application of the Amendment is proper. Honeywell contends that (1) the Amendment is preempted by ERISA; and (2) if not preempted, the Amendment cannot be applied retrospectively because retrospective application would violate (a) the Due Process Clause of the Fourteenth Amendment of the United States Constitution and the parallel provision in the Article 1, section 7 of the Minnesota Constitution, and (b) the Contracts Clause of the Article I, section 10 of the federal constitution and the parallel provision in Article 1, section 11 of the Minnesota Constitution. If the Amendment is preempted by ERISA, it is void and unenforceable; however, if the federal and state constitutions prohibit retrospective application, the Amendment could still be applied prospectively. Under either scenario, the Act would require the Association to honor Honeywell's claim.

B. ERISA Preemption and the Amendment

Section 514(a) of ERISA provides that the statute "shall supersede any and all State laws insofar as they

may now or hereafter relate to any employee benefit plan" covered by the statute. 29 U.S.C. § 1144(a). Unless a law is exempted from the preemption provision, 29 U.S.C. § 1144(b)(2)(A), it will be preempted if it "relates to" an ERISA-covered plan.

Honeywell contends that the Amendment "relates to" an ERISA plan because § 61B.03, subd. 5(c) premises the Association's statutory obligations on the existence of a pension plan covered by ERISA. Honeywell further claims that the Amendment does not fall within the "insurance savings clause" set forth in 29 U.S.C. § 1144 (b)(a). The Association responds that the Amendment is not preempted because the Amendemnt is not "related to" an ERISA plan and in any event, it falls within the insurance savings clause.

1. The Amendment is "Related To" an ERISA Plan

The Supreme Court recently stated that a law "relates to" a covered employee benefit plan for purposes of ERISA preemption "if it has a connection with or reference to such a plan." *District of Columbia v. Greater Wash. Bd. of Trade*, 113 S. Ct. 580, 583, 121 L.Ed.2d 513 (1992) (citations omitted). This broad reading of "relates to" gives effect to the "deliberately expansive" language present in section 514(a). *Id.* (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47, 107 S. Ct. 1549, 1552, 95 L.Ed.2d 39 (1987)). Laws relating to or connected with covered plans are preempted "even if the law is not specifically designed to affect such plans or the effect is only indirect," *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139, 111 S. Ct. 478, 483, 112 L.Ed.2d 474 (1990), and even if the law is "consistent with ERISA's substantive requirements." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739, 105 S. Ct. 2380, 2389, 85 L.Ed.2d 728 (1985). However, state laws which have only a "tenuous, remote, or peripheral" connection with an ERISA-covered plan are not

preempted. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 100 n.21, 103 S. Ct. 2890, 2901 n.21, 77 L.Ed.2d 490 (1983). Similarly, the mere fact that a law might burden the administration of a plan does not, by itself, compel preemption. *Ingersoll-Rand*, 111 S. Ct. at 483 (citing *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 841, 108 S. Ct. 2182, 2191, 100 L.Ed.2d 836 (1988)).

Two recent decisions of the Supreme Court support a conclusion that the Amendment is related to a plan regulated by ERISA. In *Greater Wash. Bd. of Trade*, the Supreme Court held that the District of Columbia's Workers' Compensation Equity Amendment Act of 1990 ("Equity Act"), 37 D.C. Register 6890, "specifically refer[red]" to welfare benefit plans regulated by ERISA and "on that basis alone" was preempted by ERISA.[25] 113 S. Ct. at 583. The "welfare benefit plan" at issue therein was an employer-sponsored health benefit plan for employees. As such, it was subject to ERISA regulation. *Id.* at 584. The Supreme Court concluded that because the Equity Act imposed requirements by "reference to" such a covered plan, it had to yield to ERISA. *Id.*

In *Ingersoll-Rand*, the Supreme Court held that a state law cause of action was preempted by ERISA. In that case, the Supreme Court of the State of Texas had developed a common-law right of action for employees who were terminated by their employer out of a desire to avoid paying into an employee's pension fund. 111 S. Ct. at 481. In reversing the lower court's decision, the Supreme Court reasoned that the existence of pension plan was a "critical factor" in establishing liability under Texas'

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[25] The Equity Act provided:

> "Any employer who provides health insurance coverage for an employee shall provide health insurance coverage equivalent to the existing health insurance coverage of the employee while the employee receives or is eligible to receive workers' compensation benefits under this chapter."

D.C. Code Ann. § 36-307(a-1) (Supp. 1992).

wrongful discharge law. *Id.* at 483. As a result, the Supreme Court concluded that the cause of action not only made explicit reference to, but indeed was "premised on the existence of a pension plan." *Id.* In other words, there "is no cause of action if there is *no* plan." *Id.* at 484 (emphasis supplied).

In this case, subdivision 5(c) of the Amendment excludes GIC owners and nonresident participants from the term "contractual obligation" *only when* "an unallocated annuity contract . . . funds a qualified defined contribution pension plan." Minn. Stat. § 61B.03, subd. 5(c). Under the Amendment then, the Association's obligations under the Act are determined by the *existence* (or non-existence) of a pension plan that is subject to regulation under ERISA. In other words, in the factual situation before the Court, the existence of an ERISA-governed pension plan is a "critical factor" in establishing the Association's obligations to act when an insurer is determined to be impaired.[26] Section 61B.03, subdivision 5(b), therefore, "relates to" an ERISA-covered plan within the meaning of section 514(a).

2. The "Insurance Savings Clause" Applies

"The sphere in which § 514(a) operates [is] explicitly limited by § 514(b)(2)." *Metropolitan Life Ins. Co.*, 471 U.S. at 739, 105 S. Ct. at 2389. Section 514(b)(2) of ERISA provides that "[with one exception not relevant here,] nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking or securities." 29 U.S.C. § 1144(b)(2)(A). Because the Court has deter-

[26] In determining that the Amendment "relates to" an ERISA plan, this Court does not also conclude that *Greater Wash. Bd. of Trade* holds that a law is preempted merely because it makes reference to a plan regulated by ERISA or contains the phrase "ERISA." Rather, *Greater Wash. Bd. of Trade* makes clear that a state law "relates to" an ERISA-governed plan when it ties some requirement, obligation, duty, right, or privilege to that plan.

mined that subdivision 5(c) of the Amendment "relates to" a pension plan that falls within ERISA, subdivision 5(c) of the Amendment is preempted unless it falls within the insurance savings clause.

There are two tests to consider in determining whether a statute falls within ERISA's "law regulating insurance" savings clause—a "common sense" test and the three-part test applied under the McCarron-Ferguson Act to determine whether a particular practice falls within that statute's reference to the "business of insurance." *Pilot Life*, 481 U.S. at 48, 107 S. Ct. at 1553. The common sense test directs the court to look take a "common sense view" of the language of the savings clause itself and determine whether the law "regulates insurance" under a common sense view of that term.[27] *Metropolitan Life*, 471 U.S. at 740, 105 S. Ct. at 2389. To regulate insurance under a common sense view of the savings clause, a state law "must not just have an impact on the insurance industry, but must be specifically directed toward that industry. *Pilot Life*, 481 U.S. at 50; 107 S. Ct. at 1554. The McCarron-Ferguson test requires the court to consider three factors: (1) whether the practice has the effect of transferring or spreading a policyholder's risk; (2) whether the practice is an integral part of the policy relationship between the insurer and the insured; and (3) whether the practice is limited to entities within the insurance industry. *Metropolitan Life*, at 743, 105 S. Ct. at 2391.

The Court concludes that both the common sense and *McCarron-Ferguson* "business of insurance" tests support a conclusion that the Amendment "regulates insurance." First, subdivision 5(c) of the Amendment is concerned with the *existence* of the Association's obligations to

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[27] The Court notes that despite counsels' statements to the contrary, the only connection the issues in this litigation have with "common sense" regards analyzing the applicability of the insurance savings clause.

policyholders—in the case of GIC's, contract owners. Second, the basic obligations set forth in subdivision 5(c) flow from the relationship between an insurance company and its policy holders and are no different than the failed insurer's own obligations; thus, the fundamental activity involved is insurance. Finally, subdivision 5(c), like the remainder of the Act, is concerned with the reliability of GIC contracts issued by insurers, which is at the "core of the 'business of insurance.'" *United States Treasury Dept. v. Fabe*, —— U.S. ——, 113 S. Ct. 2202, 2208, 124 L.Ed.2d 449 (1993).

In summary, although subdivision 5(c) of the Amendment is a law "related to" a pension plan governed by ERISA, it falls within the insurance savings clause set forth in ERISA section 514(b)(2)(A). 29 U.S.C. § 1144(b)(2)(A). Accordingly, the Amendment is not preempted by ERISA and the constitutional questions raised by its retrospective application must be examined.

C. Is Retrospective Application Constitutional?

Honeywell contends that retrospectively applying the Amendment violates its right to due process under the Fourteenth Amendment to the United States Constitution and Article 1, section 7 of the Minnesota Constitution [28] and unlawfully impairs its contract rights under Article I, section 10 of the federal constitution and Article 1, section 11 of the Minnesota constitution.[29] Although Honeywell raises several theories of constitutional law in support of its position, its contention that retrospective application would impermissibly deprive it of "vested rights" under the Act is dispositive.

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[28] Amendment XIV, § 1 of the federal constitution provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." Minn. Const., art. 1, § 7, contains identical language.

[29] Article I, § 10 of the federal Constitution provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." Minn. Const., art. 1, § 11 contains substantially similar language.

Acts of the legislature are presumed constitutional and the party seeking to invalidate an act as unconstitutional bears the burden to demonstrate that the act is unconstitutional. Honeywell contends that the Amendment is unconstitutional because under both the United States Constitution and the Minnesota Constitution, retroactive legislation may not divest private parties of "vested rights."[30] *Coombes v. Getz*, 285 U.S. 434, 442, 52 S. Ct. 435, 436, 76 L.Ed. 866 (1932); *Holen v. Minneapolis-St. Paul Met. Airports Comm'n*, 250 Minn. 130, 136, 84 N.W.2d 282, 287 (1957). Honeywell contends that under the pre-Amendment version of the Act, IDS, a Minnesota resident, owned the ELIC GIC's; thus, under section 61B.06, subdivision 7, IDS had a vested right to coverage under the Act if ELIC was determined to be impaired. The retrospective application of subdivision 5(c) of the Amendment, Honeywell continues, deprives IDS—and through it, Honeywell—of the Association's coverage obligations thereby unlawfully destroying the contract rights created by the Act.

Ordinarily, rights remain inchoate and do not vest in an existing law until a *final* judgment has been entered

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[30] Minnesota courts have repeatedly referred to a "vested" right as "something more than a mere expectancy, based upon anticipated continuance of present laws. It must be some right or interest in property that has become fixed or established and is not open to doubt or controversy." *See e.g., Olsen v. Special School Dist. No. 1*, 427 N.W.2d 707, 711 (Minn. Ct. App. 1988) (quoting *Schwartzkopf v. Sac County Bd. of Supervisors*, 341 N.W.2d 1, 8 (Iowa 1983) (citations omitted)); *see also Snortum v. Snortum*, 155 Minn. 230, 233, 193 N.W. 304, 306 (1923). This definition comports the view expressed by the Minnesota Supreme Court in *Peterson v. Minneapolis*, 285 Minn. 282, 288, 173 N.W.2d 353, 357 (1969): " 'vested interest' when used in the constitutional sense to describe the kind of interest that canot be impaired by subsequent legislation, reflects a determination that justice and equity require that the interest be preserved." Minnesota' construction of "vested right" mirrors the Supreme Court's definition of that term. *See Ettor v. Tacoma*, 228 U.S. 148, ——, 33 S. Ct. 428, 430 (1913).

therein.[31] *Holen*, 250 Minn. at 136, 84 N.W.2d at 287; *McClelland v. McClelland*, 393 N.W.2d 224, 227 (Minn. Ct. App. 1986). There are conditions, however, under which private rights may "vest" without regard to whether final judgment has been entered. "When a right has arisen upon a contract, or transaction in the nature of a contract, authorized by statute and liabilities under that right have been so far determined that nothing remains to be done by the party asserting it, it becomes vested and the [amendment] of the statute does not affect it or the action for its enforcement." *Yaeger v. Delano Granite Works*, 250 Minn. 303, ——, 84 N.W.2d 363, 366 (1957); *see Steamship Co. v. Joliffe*, 69 U.S. (2 Wall.) 450, 457-58 (1864). The same result is reached where a statute, although not authorizing a contract, creates contractual liability independent of, i.e., may be enforced without regard to, the statute itself. *Coombes*, 52 S. Ct. at 436. In either case, the vested nature of the right claimed precludes subsequent legislation from being retrospectively applied to destroy the ability to enforce the right.[32]

In *Coombes*, the California Constitution of 1879 provided that "the directors or trustees of a corporation and

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[31] The Association takes issue with Honeywell's reliance on several Minnesota decisions discussing whether retrospective legislation can affect vested rights in accordance with due process or the Contracts Clause. (Def's Mem. Opp'n Mot. Summ J., at 9-15.) That the facts underlying those decisions differ from the facts of the case at bar is immaterial; they are relevant because they establish that vested rights, however created, cannot, consistent with constitutional principles, be defeated by retrospective application of subsequent legislation.

[32] The Association contends that Contract Clause is inapplicable to Honeywell's rights against the Association because the rights, if any, arise under the statute, not from any "contract" with the Association. As is discussed *infra*, Honeywell's claims against the Association may actually be contractual in nature. Moreover, in *Coombes*, the Supreme Court relied on both the Contracts Clause and Due Process Clause to invalidate the state statute at issue in that case. The vested rights doctrine, therefore, has roots in both the Contracts Clause and due process.

joint stock enterprise shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation or joint stock association during the term of such director or trustee." *Id.* at 435 (quoting Cal. Const. of 1879, § 3, art. 12). Coombes, a creditor of Getz Bros. and Co., brought suit against Getz, a director of that corporation, to recover the amount of an indebtedness upon an open account for goods sold to the corporation. *Id.* The trial court dismissed the action—on grounds not important here—and Coombes appealed. During the pendency of the appeal, the California Assembly repealed the provision of the California Constitution on which Coombes' action was based. *Id.* Getz moved to dismiss the appeal on the ground that the repeal had abated the cause of action.

The California Supreme Court granted the motion. In doing so, that court held that Coombes' cause of action was brought upon a statutory right that could be repealed at any time. Thus, because the cause of action had not been reduced to final judgment, the rights under the state constitution remained "inchoate" and fell with the repeal. Coombes appealed to the United States Supreme Court, claiming that the retrospective application of the repeal violated the Contracts Clause. The Supreme Court reversed.

The Supreme Court reasoned that a legislature's power to amend or repeal statutes is not unlimited: "neither vested property rights nor the obligation of contracts of third persons may be destroyed or impaired." *Id.* at 436. The Court then described Coombes' rights as they existed prior to the repeal:

> The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision. His cause of action was not purely statutory. It did not arise upon the constitutional rule of law, but upon the *contractual liability created in pursuance of the rule.* Al-

> though the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end to the rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor (which was in every sense a property right).

Id. (emphasis added).

The Supreme Court compared precedent on both sides of the issue, comparing each to its views of the vested rights Coombes sought to enforce. First, the Court examined three of its prior decisions, each of which held that rights under a statute had vested prior to the repeal of the statute creating the right; hence, the repeal could not stand as a barrier to enforcement of the right. *See Ettor v. Tacoma*, 228 U.S. 148, 156, 33 S. Ct. 428, 430, 57 L.Ed. 773 (1913) (statute mandating payments for property damage)[33]; *Joliffe*, 69 U.S. (2 Wall.) 450 (statute concerning payments of pilotage fees); *Hawthorne v. Calef*, 69 U.S. (2 Wall.) 10, 22, 17 L.Ed. 776 (1864) (statute concerning individual liability of shares of stockholders in railroad company for debts of the corporation).[34] Thereafter, the *Coombes* Court distinguished a

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[33] *Ettor* offered the following explanation why a vested right could not be defeated by subsequent legislation:

> Nothing remained to be done to complete the plaintiff's right to compensation except the ascertainment of the amount of damages to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes and the right so vested cannot be defeated by subsequent legislation.

228 U.S. at ——, 33 S. Ct. at 430.

[34] It is true that the factual underpinnings of *Coombes* differ from those in *Joliffe*, *Ettor*, and *Hawthorne*; however, it would be incorrect to read too much into the distinction. The common thread linking each of those decisions is the general rule that "it is not consistent with due process to take away from a private party [by

line of California cases purportedly establishing that the repeal of a law creating a liability extinguished any pending cause of action brought under the repealed statute. 52 S. Ct. at 437-38. In distinguishing *Napa State Hosp. v. Flaherty*, 134 Cal. 315, 66 P. 322 (1901)[35], the Court stated:

> The case here is entirely different. There the obligation which was imposed upon the relatives was purely statutory. No act was contemplated on their part by way of assumption of an obligation in order to fix the liability. No element of a contract was present. Here both parties acted. The creditor extended credit to the corporation; and his action in so doing, under the state constitutional provisions, brought into force for his benefit the constitutional obligation of the director, which, by becoming a director, the latter had voluntarily assumed and, thereby, in the eye of the law, created against himself a contractual liability in the nature of a suretyship.

52 S. Ct. at 438. The Court concluded:

> It is settled by decisions of this and other federal courts . . . that upon the facts here disclosed, a con-

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subsequent legislative act] a right to recover the amount that is due when the act is passed." *Graham v. Goodcell*, 282 U.S. 409, 51 S. Ct. 186, 194 (1931) (citing, *inter alia*, *Joliffe* and *Ettor*).

[35] *Napa* involved a state statute that made the relatives of an insane person liable for that person's board during any period of commitment to a state-run insane asylum. During the hospital's suit against relatives of an insane person, the statute was repealed. In affirming dismissal of the suit, the California Supreme Court held that though the hospital had provided the insane person with board prior to the repeal, the repeal destroyed any right to recover from the family:

> where a right is created solely by a statute, and is dependent upon the statute alone, and such right is still inchoate, and not reduced to possession, or perfected by final judgment, the repeal of the statute destroys the remedy . . . .

66 P. at 323.

> tractual obligation arose; and the right having become vested, comes within the protection of both the contract impairment clause in article 1, § 10, and the due process clause in the Fourteenth Amendment of the federal Constitution.

Id.

Supreme Court decisions issued since *Coombes* and the line of cases preceding it have not overruled, either expressly or *sub silentio*, the rule of law discussed therein.[36] *See Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 104 S. Ct. 2709, 81 L.Ed.2d 601 (1984) (discussing principles of due process governing retroactive application of federal legislation); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S. Ct. 2882, 49 L.Ed. 2d 752 (1976).[37]

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[36] The First Circuit, in *Hammond v. United States*, 786 F.2d 8 (1st Cir. 1986), questioned the vitality of *Coombes* and *Ettor*, stating that subsequent decisions have permitted the retroactive application of statutes which "abridged economic and real property rights" without "carefully distinguishing the older cases." *Id.* at 11. The Supreme Court decisions cited in *Hammond*, however, are either distinguishable on their facts—they involved Congress' exercise of its enumerated powers—and/or predate *Coombes*. *Cf. Connell v. United States*, 737 F. Supp. 61, 63 (S.D. Iowa 1990) (recognizing the rule created by *Coombes* and *Ettor*, but distinguishing those decisions from cases involving common law tort rights).

[37] In *Usery*, the Supreme Court cited several cases in support of its statement that "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." 428 U.S. at 16, 96 S. Ct. at 2893. The decisions cited in *Usery* dealt with the power of Congress to exercise its enumerated powers; hence, they are distinguishable on their facts. *See e.g., Norman v. Baltimore & O Ry. Co.*, 294 U.S. 240, ——, 55 S. Ct. 407, 416, 79 L.Ed. 885 (1935) (contracts, even those which establish property rights, have a "cogenital infirmity" when they deal with subject matter lying within the control of Congress).

In addition, though the Association contends that the Supreme Court in *General Motors Corp. v. Romein*, 112 S. Ct. 1105, 117 L.Ed.2d 328 (1992), rejected contract clause and due process

Turning to the case at bar, it has already been established that under the pre-Amendment Act, the Association owed obligations to a GIC owner who was a Minnesota resident, even if that owner was not a participant in a pension plan. Adapting the principle stated in *Coombes*, Honeywell, in bringing this action to enforce its rights under the Act, is not relying on a statutory right that, until reduced to final judgment, remains inchoate. Here, the Association's payment and guarantee obligations, though arising from the Act, were based on the voluntary actions of both parties and thus were contractual in nature: Honeywell (through IDS) purchased covered GIC contracts from a member of the Association; its action in so doing, under the Act, brought into force for its benefit the statutory obligation of the Association, the members of which, by selling insurance in Minnesota, had voluntarily assumed, and thereby, in the eye of the law, created against themselves—in the form of the Association —a contractual liability. Whether this liability is considered one of surety or of guarantee, its nature as a *contractual* liability remains unchanged.

As the Association's liability under the Act was contractual, Honeywell's right to enforce that liability had become "fully perfected and vested" prior to the Amendment. As a result, the Amendment may have limited the Association's obligations in the future, but it did not and could not destroy or impair the previously vested right. *See Coombes*, 52 S. Ct. at 436. Accordingly, the right to enforce the Association's obligations came within the protection of both the Contracts Clause and Due Process Clause of the federal and Minnesota Constitutions. *See id.* at 438. Therefore, the Amendment, which had the effect of eliminating the Association's liability to IDS—and

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"vested rights" challenges to a retrospective amendment, a close reading of *Romein* does not support that conclusion. First, the term "vested rights" does not appear in *Romein*. Second, the references in *Romein* to "closed" periods and "closed transactions," 112 S. Ct. at 1110, 1112, are not akin to the rights discussed in *Coombes*.

through it, to Honeywell—violates those protections and cannot stand.[38]

D. Severability

Under Minnesota law, an unconstitutional amendment has no effect and leaves the statute as it was before the amendment. *Bongard v. Bongard*, 342 N.W.2d 156, 158 (Minn. Ct. App. 1983). In addition, Minn. Stat. § 645.20 provides that the provisions of all laws are severable unless the court finds the valid provisions of the law are so

> essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume that the legislature would have enacted the remaining valid provisions without the void ones, or unless the court finds the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with legislative intent.

Based upon the foregoing, the Court concludes that the definition of "contractual obligation" shall exist as amended in 1992, except that section 61B.03, subd. 5(c), having been declared unconstitutional, is no longer part of the definition. The remaining portions of the Amendment are not facially dependent upon that subdivision and there is nothing in the record which indicates that the

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[38] Decisions by the Supreme Court have also indicated that retrospective legislation may offend due process if it is "particularly harsh and oppressive." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.13, 97 S. Ct. 1505, 1515 n.13, 52 L.Ed.2d 92 (1977) (quoting *Welch v. Henry*, 305 U.S. 134, 147, 59 S. Ct. 121, 125, 83 L.Ed. 87 (1938)). Although the Supreme Court in *Gray* indicated that "harsh and oppressive" is synonymous with an "arbitrary and irrational" standard, 467 U.S. at 733, 104 S. Ct. at 2720, it can reasonably be stated that retrospective legislation that impairs or eliminates vested rights is harsh and oppressive. *See Goodcell*, 282 U.S. at ——, 51 S. Ct. at 194.

legislature would not have passed the Amendment if subdivision 5(c) were invalidated. Indeed, the Court has already determined that the pre-Amendment Act's definition of "contractual obligations" included the contracts at issue in the case at bar. The remainder of the definition does not more than express that fact.

III. Motion for Summary Judgment on the Subrogation Amendment

Honeywell's motion for summary judgment on the Subrogation Amendment has three prongs, each of which is based upon ERISA. First, Honeywell contends that subdivision 7(a) of the Subrogation Amendment cannot provide the Association with a right of action under ERISA because the Association would not have standing to bring a breach of fiduciary duty claim under ERISA. The Association responds that it would have the required standing as an assignee of plan participants' causes of action. Honeywell replies that the cases finding such "derivative standing" have no application to ERISA pension plans.

Section 502 of ERISA, 29 U.S.C. §1132(a), provides that a civil action may be brought by a plan "participant," "beneficiary," or "fiduciary," or by the Secretary of Labor. As the Association is not any of these, it does not have independent standing to maintain a breach of fiduciary duty claim. *Hermann Hosp. v. MEBA Med. & Ben. Plan*, 845 F.2d 1286, 1288 (5th Cir. 1988). However, notwithstanding Honeywell's assertions, nothing in ERISA's prohibition on assigning pension benefits, 29 U.S.C. § 1056(d), or case law interpreting that provision, precludes the Association from obtaining derivative standing to bring claims for breach of fiduciary duty under sections 1109 and 1132. 29 U.S.C. §§ 1109(a), 1132(a).

A cause of action for breach of fiduciary duty is not a "benefit" which exists under the plan; it is created by ERISA itself. Moreover, the purpose behind the anti-assignment clause, *see Misic v. Building Serv. Employees*

Health & Welfare Trust, 789 F.2d 1374, 1376-77 (9th Cir. 1986), has no relevance here; the participants in the Plans will receive their benefits when the Association fulfills its obligations under the Act. In fact, the Subrogation Amendment may actually facilitate recovery of lost benefits. Absent assigning their rights to the Association, plan participants must bring a cause of action against the plan and trustees for breach their ERISA-created fiduciary duties. Forcing plan participants to engage in litigation is at odds with ERISA's purpose of making plans whole—presumably achieving the desired result without having to engage in litigation is preferable to the alternative.

Honeywell next contends that the Subrogation Amendment is invalid because it interferes with ERISA's enforcement scheme by "redirecting" ERISA's remedial focus away from losses to covered plans. Honeywell claims that permitting the Association to gain assignment and subrogation rights would permit relief to inure to a party other than a covered *plan* and would assign liability to fiduciaries in the absence of any *loss* to the plan or its participants. *See Physicians Healthchoice, Inc. v. Trustees, Automotive Employee Benefit Trust*, 988 F.2d 53, 55 (8th Cir. 1993).

The rights the Association gains under the Subrogation Amendment are not improper merely because ERISA requires that actions brought under section 1132(a) seek only to restore losses incurred by covered plans. In this case, it is undisputed that the plan actually sustained losses, allegedly from Honeywell's breaches of fiduciary duty. It is only because the Association may be called upon to guarantee the GIC's that the losses to the participants may be minimized without resorting to litigation. The protection participants gain under the Act does not alter the fact that the losses suffered as a result of the allegedly imprudent investment in ELIC GIC's are losses of a type intended to be actionable under section

1109. *See Physicians Healthchoice*, 988 F.2d at 55. In addition, the availability of a remedy to the Association, namely repayment of expenditures which, but for the Act, would have been losses to the Plans, furthers a "cognizable ERISA interest" of the Plans and their participants. Based upon the foregoing, it is proper to construe "losses to the plan" broadly enough to include losses which are paid by a life and health insurance guaranty association pursuant to statute. *Cf. id.* at 56 (holding that interests of ERISA plan and participants are not furthered by an action brought by *a creditor* of an ERISA-covered health and welfare plan to recover past due payments).

Finally, Honeywell argues that subdivision 7(a) of the Subrogation Amendment is preempted to the extent that it concerns rights participants may have under ERISA plans. Honeywell claims that subdivision 7(a) is preempted under (1) *Greater Washington Bd. of Trade* because it specifically refers to ERISA, and (2) *Ingersoll-Rand*, because it is "connected to" an ERISA plan. However, the Court has earlier reviewed *Greater Wash. Bd. of Trade* and *Ingersoll-Rand*, as well as the insurance savings clause, and determines that subdivision 7(a) is not preempted by ERISA.[39]

In summary, the Court concludes that ERISA does not invalidate subdivision 7(a) of the Subrogation Amendment. Accordingly, the Association is entitled to be subrogated to, and receive assignment of, the rights of plan participants who receive benefits under the Act, as well as to any causes of action relating to the ELIC GIC's. Honeywell's assertion that subdivision 7(c) is preempted by ERISA likely is correct, *see Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47, 107 S. Ct. 1549, 1553, 95 L.Ed.2d 39 (1987); however, in light of the Court's de-

[39] If Honeywell is correct in its claim that the Subrogation Amendment was preempted, Honeywell's right to make a claim to the Association, which is similarly connected to an ERISA plan, would also be preempted.

termination that the Association may bring claims of breach of fiduciary duty under ERISA, whether subdivision 7(c) is preempted need not be decided at this time.

Conclusion

Based on the files, records, and proceedings herein, and the briefs and arguments of counsel, IT IS ORDERED that:

1. plaintiff Honeywell's Motion for Summary Judgment (Doc. No. 6) is GRANTED as to Honeywell's claims in Counts III, IV, V and VI of the Complaint and is, in all other respects, DENIED;

2. defendant Association's Motion for Summary Judgment (Doc. No. 10) is GRANTED as to the Association's claim that the 1992 amendment to Minn. Stat. § 61B.06, subd. 7(a) is valid, and is, in all other respects, DENIED.

Dated: September 22, 1993

/s/ Richard H. Kyle
RICHARD H. KYLE
United States District Judge

APPENDIX G

MINNESOTA STATUTES

CHAPTER 61B

LIFE AND HEALTH GUARANTY ASSOCIATION

61B.01 CITATION.

Sections 61B.01 to 61B.16 may be cited as the Minnesota life and health insurance guaranty association act.

61B.02 SCOPE, PURPOSE AND CONSTRUCTION.

Subsection 1. **Scope.** Sections 61B.01 to 61B.16 apply to direct life insurance policies, health insurance policies including subscriber contracts issued by a nonprofit health service plan corporation operating under chapter 62C, annuity contracts, and contracts supplemental to life and health insurance policies or annuity contracts, issued by persons authorized at any time to transact insurance or business as a nonprofit health service plan corporation operating under chapter 62C in this state. Sections 61B.01 to 61B.16 do not apply to:

(a) any policy or contract or part thereof under which the risk is borne by the policyholder;

(b) any policy or contract or part thereof assumed by an impaired insurer under a contract of reinsurance other than reinsurance for which assumption certificates have been issued;

(c) any policy or contract issued by an assessment benefit association operating under chapter 63, or a fraternal benefit society operating under chapter 64B; or

(d) any health insurance policies issued by a person other than a person authorized to write life insurance in this state or other than a person whose corporate charter

would permit the writing of life insurance but who is authorized to write only health insurance in this state.

Subd. 2. **Purpose.** The purpose of sections 61B.01 to 61B.16, is to protect policyowners, death benefit certificate holders, insureds, beneficiaries, annuitants, payees, and assignees of life insurance policies, health insurance policies, annuity contracts, and supplemental contracts, subject to certain limitations against failure in the performance of contractual obligations due to the impairment of the insurer issuing the policies or contracts. To provide this protection:

(a) An association of insurers is created to enable the guaranty of payment of benefits and of continuation of coverages;

(b) Members of the association are subject to assessment to provide funds to carry out the purpose of sections 61B.01 to 61B.16; and

(c) The association shall assist the commissioner, in the prescribed manner, in the detection and prevention of insurer impairments.

Subd. 3. **Construction.** Sections 61B.01 to 61B.16 shall be liberally construed to effect the purpose of sections 61B.01 to 61B.16. Subdivision 2 shall constitute an aid and guide to interpretation.

61B.03 DEFINITIONS.

Subdivision 1. **Scope.** For the purposes of sections 61B.01 to 61B.16, the terms defined in this section have the meanings given them.

Subd. 2. **Account.** "Account" means any of the three accounts created under section 61B.04, subdivision 1.

Subd. 3. **Annuity contracts.** "Annuity contracts" means contracts subject to chapter 61A wherein the policyowner agrees to make payments to the insurer at the beginning of the contract period and the insurer agrees to make pay-

ments thereafter to the insured for a specified period of time or until the insured's death.

Subd. 4. **Association.** "Association" means the Minnesota life and health insurance guaranty association created under section 61B.04. The association shall not be considered a state agency for purposes of chapter 16 or 43.

Subd. 5. **Contractual obligation.** "Contractual obligation" means any obligation under covered policies.

Subd. 6. **Covered policy.** "Covered policy" means any policy or contract owned by a Minnesota resident to which sections 61B.01 to 61B.16 apply, as provided in section 61B.02.

Subd. 7. **Direct life insurance.** "Direct life insurance" means life insurance generally, except annuity contracts, regulated under chapter 61A or 64B, credit life insurance regulated under chapter 62B, and death benefit certificates regulated under chapter 64B.

Subd. 8. **Health insurance.** "Health insurance" means accident and health insurance regulated under chapter 62A and credit accident and health insurance regulated under chapter 62B and subscriber contracts issued by a nonprofit health service plan corporation operating under chapter 62C.

Subd. 9. **Impaired insurer.** "Impaired insurer" means:

(a) An insurer which, after May 27, 1977, becomes insolvent and is placed under an order of liquidation, rehabilitation, or conservation by a court of competent jurisdiction; or

(b) An insurer determined by the commissioner, after May 27, 1977, to have become unable or potentially unable to fulfill its contractual obligations.

Subd. 10. **Member insurer.** "Member insurer" means any person authorized to transact in this state any kind of insurance or business to which sections 61B.01 to 61B.16 apply under section 61B.02.

Subd. 11. **Premiums.** "Premiums" means direct gross insurance premiums and annuity considerations written on covered policies, less return premiums and considerations thereon and dividends paid or credited to policyholders on direct business. Premiums do not include premiums and considerations on contracts between insurers and reinsurers. For the purpose of section 61B.07, premiums are those for the calendar year preceding the determination of impairment.

Subd. 12. **Person.** "Person" means any individual, corporation, partnership, association or voluntary organization.

Subd. 13. **Resident.** "Resident" means any person who resides in this state at the time the impairment is determined and to whom contractual obligations are owed.

Subd. 14. **Commissioner.** "Commissioner" means the commissioner of commerce of the state of Minnesota and, in the commissioner's absence or disability, a deputy or other person duly designated to act in the commissioner's place.

61B.04 CREATION OF ASSOCIATION.

Subdivision 1. **Nature of association.** There is created a nonprofit legal entity to be known as the Minnesota life and health insurance guaranty association. All member insurers shall be and remain members of the association as a condition of their authority to transact insurance in this state. The association shall perform its functions under the plan of operation established and approved under section 61B.08, and shall exercise its powers through a board of directors established under section 61B.05. For purposes of assessment, the association shall establish three accounts:

(a) The health insurance account;

(b) The life insurance account; and

(c) The annuity account.

Subd. 2. **Supervision by commissioner of commerce.** The association shall be under the immediate supervision of the commissioner and shall be subject to the insurance laws of this state.

61B.05 BOARD OF DIRECTORS.

Subdivision 1. **Composition of board.** The board of directors of the association shall consist of nine members. The members of the board shall be selected by the association members subject to the approval of the commissioner. Vacancies on the board shall be filled for the remaining period of the term in the manner described in the plan of operation.

Subd. 2. **Representative selection.** In approving selections or in appointing members to the board, the commissioner shall consider, among other things, whether all member insurers are fairly represented.

Subd. 3. **Compensation.** Members of the board may be reimbursed from the assets of the association for reasonable and necessary expenses incurred by them as members of the board, but shall not otherwise be compensated by the association for their services.

Subd. 4. **Committees and meetings.** Except as otherwise prescribed in the plan of operation:

(a) The board of directors may, by unanimous affirmative action of the entire board, designate two or more of their number to constitute an executive committee, which, to the extent determined by unanimous affirmative action of the entire board, has and shall exercise the authority of the board in the management of the business of the association. This executive committee shall act only in the interval between meetings of the board, and is subject at all times to the control and direction of the board.

(b) The board of directors may, by unanimous affirmative action of the entire board, create additional commit-

tees, which have and shall exercise the specific authority and responsibility as determined by the unanimous affirmative action of the entire board.

(c) Any action which may be taken at a meeting of the board of directors or of a lawfully constituted executive committee thereof may be taken without a meeting if authorized by a writing or writings signed by all the directors or by all of the members of the committee, as the case may be. This action is effective on the date on which the last signature is placed on the writing or writings, or an earlier effective date as set forth therein.

(d) Members of the board of directors or of a lawfully constituted executive committee thereof, may participate in a meeting of the board or committee by means of conference telephone or similar communications equipment through which all persons participating in the meeting can hear each other. Participation in a meeting pursuant to this clause constitutes presence in person at the meeting.

61B.06 POWERS AND DUTIES OF THE ASSOCIATION.

Subdivision 1. **Impaired domestic insurer.** (a) If a domestic insurer is an impaired insurer, the association may, prior to an order of liquidation, conservation or rehabilitation, and subject to any conditions imposed by the association and approved by the impaired insurer and the commissioner, other than those which impair the contractual obligations of the impaired insurer, guarantee, assume, or reinsure, or cause to be guaranteed, assumed, or reinsured, the covered policies of the impaired insurer, and shall make or cause to be made prompt payment of the contractual obligations of the impaired insurer which are due and owing.

(b) If a domestic insurer is an impaired insurer, the association shall, after entry of an order of liquidation, conservation or rehabilitation, subject to any conditions imposed by the association and approved by the commis-

sioner, guarantee, assume, or reinsure, or cause to be guaranteed, assumed, or reinsured, the covered policies of the impaired insurer, and shall make or cause to be made prompt payment of the contractual obligations of the impaired insurer which are due and owing.

Subd. 2. **Impaired foreign or alien insurer.** If a foreign or alien insurer is an impaired insurer under an order of liquidation, rehabilitation, or conservation, the association shall, subject to any conditions imposed by the association and approved by the commissioner, guarantee, assume, or reinsure or cause to be guaranteed, assumed, or reinsured, the covered policies of residents, and shall make or cause to be made prompt payment of the impaired insurer's contractual obligations which are due and owing to residents.

Subd. 3. **Liens.** (a) In carrying out its duties under subdivision 1, clause (b), or 2, the association may request that there be imposed policy liens, contract liens, moratoriums on payments, or other similar means and the liens, moratoriums, or similar means may be imposed if the commissioner:

(1) Finds that the amounts which can be assessed under sections 61B.01 to 61B.16 are less than the amounts needed to assure full and prompt performance of the impaired insurer's contractual obligations, or that economic or financial conditions as they affect member insurers are sufficiently adverse to cause the imposition of policy or contract liens, moratoriums, or similar means to be in the public interest; and

(2) Approves the specific policy liens, contract liens, moratoriums, or similar means to be used.

(b) Before being obligated under subdivision 1, clause (b), or 2, the association may request that there be imposed temporary moratoriums or liens on payments of cash values and policy loans. The temporary moratoriums and liens may be imposed if approved by the commissioner.

Subd. 4. **Foreign jurisdiction coverage.** The association shall have no liability under this section for any covered policy of a foreign or alien insurer whose domiciliary jurisdiction or state of entry provides protection, by statutes or rule, for residents of this state, which protection is substantially similar to that provided by sections 61B.01 to 61B.16, for residents of other states and any recovery provided for under sections 61B.01 to 61B.16 shall be reduced by the amount of recovery under any such coverage provided by another state or jurisdiction.

Subd. 5. **Advisory function.** The association shall, upon the request of the commissioner, render assistance and advice concerning rehabilitation, payment of claims, continuations of coverage, or the performance of other contractual obligations of any impaired insurer.

Subd. 6. **Standing.** The association shall have standing to appear before any court in this state with jurisdiction over an impaired insurer concerning which the association is or may become obligated under sections 61B.01 to 61B.16. Standing shall extend to all matters germane to the powers and duties of the association, including proposals for reinsuring or guaranteeing the covered policies of the impaired insurer and the determination of the covered policies and contractual obligations.

Subd. 7. **Assignment; subrogation.** (a) Any person receiving benefits under sections 61B.01 to 61B.16 shall be deemed to have assigned rights under the covered policy to the association to the extent of the benefits received, whether the benefits are payments of contractual obligations or continuation of coverage. The association may require an assignment to it of the rights by any payee, policy or contract owner, beneficiary, insured, or annuitant as a condition precedent to the receipt of any rights or benefits conferred by sections 61B.01 to 61B.16 upon the person. The association shall be subrogated to these rights against the assets of any impaired insurer.

(b) The subrogation rights of the association under this subdivision shall have the same priority against the assets of the impaired insurer as that of the person entitled to receive benefits.

Subd. 8. **Extent of liability.** The contractual obligations of the impaired insurer for which the association becomes liable shall be only as great as the contractual obligations of the impaired insurer would have been in the absence of an impairment, unless the obligations are reduced as permitted by subdivision 3, but the aggregate liability of the association shall not exceed $100,000 in cash values, or $300,000 for all benefits, including cash values, with respect to any one life.*

Sub. 9. **Powers of association.** The association may:

(a) Enter into contracts necessary or proper to carry out the provisions of sections 61B.01 to 61B.16 and their purpose;

(b) Sue or be sued, including the taking of legal actions necessary or proper for recovery of unpaid assessments under section 61B.07;

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* [Text of subd. 8a as added by Laws 1991, c. 325, art. 5, § 2, effective August 1, 1992.]

Subd. 8a. **Adjustment of liability limits.** To the extent there are any limits for particular policies covered under this chapter, the dollar amounts stated in subdivision 8 shall be adjusted for inflation based upon the implicit price deflator for the gross national product compiled by the United States Department of Commerce and hereafter referred to as the index. The dollar amounts stated in subdivision 8 are based upon the value of the index for January 1990, which is the reference base index for purposes of this subdivision. The dollar amounts in subdivision 8 shall change on October 1 of each year after 1992, based upon the percentage difference between the index for January of the preceding year and the reference base index, calculated to the nearest whole percentage point. The commissioner shall announce and publish, on or before April 30 of each year, the changes in the dollar amounts required by this clause to take effect on October 1 of that year.

(c) Borrow money to effect the purposes of sections 61B.01 to 61B.16. Any notes or other evidence of indebtedness of the association not in default shall be legal investments for domestic insurers and may be carried as admitted assets;

(d) Employ or retain persons necessary to handle the financial transactions of the association, and perform other necessary or proper functions;

(e) Negotiate and contract with any liquidator, rehabilitator, conservator, or ancillary receiver to carry out the powers and duties of the association;

(f) Take legal action as may be necessary to avoid payment of improper claims;

(g) Exercise, for the purposes of sections 61B.01 to 61B.16 and to the extent approved by the commissioner, the powers of a domestic life or health insurer, but in no case may the association issue insurance policies or annuity contracts other than those issued to perform the contractual obligations of an impaired insurer.*

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* [Text of subd. 9 as amended by Laws 1991, c. 325, art. 5, § 3, effective August 1, 1992.]

Subd. 9. **Powers of association.** (a) The association may:

(1) enter into contracts necessary or proper to carry out the provisions of sections 61B.01 to 61B.16 and their purpose;

(2) sue or be sued, including the taking of legal actions necessary or proper for recovery of unpaid assessments under section 61B.07;

(3) borrow money to effect the purposes of sections 61B.01 to 61B.16. Any notes or other evidence of indebtedness of the association not in default shall be legal investments for domestic insurers and may be carried as admitted assets;

(4) employ or retain persons necessary to handle the financial transactions of the association, and perform other necessary or proper functions;

(5) negotiate and contract with any liquidator, rehabilitator, conservator, or ancillary receiver to carry out the powers and duties of the association;

(6) take legal action as may be necessary to avoid payment of improper claims; and

61B.07 ASSESSMENTS.

Subdivision 1. **Assessment by board.** For the purpose of providing the funds necessary to carry out the powers and duties of the association, the board of directors shall assess the member insurers separately for each account, at the times and for the amounts the board finds necessary. Assessments are due on the date specified by the board. This date shall not be less than 30 days after prior written notice thereof to the member insurers, and shall accrue interest at the rate of six percent a year on and after the due date.

Subd. 2. **Classes of assessments.** There shall be three classes of assessments, as follows:

(a) Class A assessments shall be made for the purpose of meeting administrative costs and other general expenses not related to a particular impaired insurer and conducting examinations under section 61B.10;

(b) Class B assessments shall be made to the extent necessary to carry out the powers and duties of the association under section 61B.06 with regard to impaired domestic insurers;

(c) Class C assessments shall be made to the extent necessary to carry out the powers and duties of the association under section 61B.06 with regard to impaired foreign or alien insurers.

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(7) exercise, for the purposes of sections 61B.01 to 61B.16 and to the extent approved by the commissioner, the powers of a domestic life or health insurer, but in no case may the association issue insurance policies or annuity contracts other than those issued to perform the contractual obligations of an impaired insurer.

(b) The association must borrow any money necessary to effect the purposes of sections 61B.01 to 61B.16. Any notes or other evidence of indebtedness of the association not in default are legal investments for domestic insurers and may be carried as admitted assets.

Subd. 3. **Formula for determination.** (a) The amount of any class A assessment shall be determined by the board and may be made on a non-pro rata basis. The amount of any class B or C assessment shall be allocated for assessment purposes among the accounts in the proportion that the premiums received by the impaired insurer on the policies covered by each account bear to the premiums received by the impaired insurer on all covered policies.

(b) Class C assessments against member insurers for each account shall be in the proportion that the premiums received on business in this state by each assessed member insurer on policies covered by each account bear to premiums received on business in this state by all assessed member insurers. Notwithstanding the foregoing, the minimum class C assessment against a member insurer is $10.

(c) Class B assessments for each account shall be made separately for each state in which the impaired domestic insurer was authorized to transact insurance at any time, in the proportion that the premiums received on business in the state by the impaired insurer on policies covered by the account bear to premiums received in all states by the impaired insurer. The assessments against member insurers shall be in the proportion that the premiums received on business in each state by each assessed member insurer on policies covered by each account bears to premiums received on business in the state by all assessed member insurers. Notwithstanding the foregoing, the minimum class B assessment against a member insurer is $10.

(d) Assessments for funds to meet the requirements of the association with respect to an impaired insurer shall not be made until necessary to implement the provisions of sections 61B.01 to 61B.16. Classifications of assessments under subdivision 2, and computation of assessments under this subdivision shall be made with a reason-

able degree of accuracy, recognizing that exact determinations may not always be possible.

Subd. 4. **Abatement or deferment.** The association may abate or defer, in whole or in part, the assessment of a member insurer if, in the opinion of the board, payment of the assessment would endanger the ability of the member insurer to fulfill its contractual obligations. The total of all assessments upon a member insurer for each account shall not, in any one calendar year, exceed two percent of the insurer's premiums in this state on the policies covered by the account.

Subd. 5. **Additional assessment.** In the event that an assessment against a member insurer is abated, or deferred, in whole or in part, because of the limitations set forth in subdivision 4, the amount by which the assessment is abated or deferred may be assessed against other member insurers in a manner consistent with the basis for assessments set forth in this section. If the maximum assessment, together with the other assets of the association, does not provide in any one year an amount sufficient to carry out the responsibilities of the association, the necessary additional funds shall be assessed as soon thereafter as permitted by sections 61B.01 to 61B.16.

Subd. 6. **Refund.** The board may, by an equitable method as established in the plan of operation under section 61B.08, refund to member insurers, in proportion to their contributions to particular accounts, the amount by which the assets of the account exceed the amount the board finds necessary to carry out during the coming year the obligations of the association with regard to that account, including assets accruing from net realized gains and income from investments. A reasonable amount may be retained in any account to provide funds for the continuing expenses of the association and for future losses if refunds are impractical.

Subd. 7. **Certificate of contribution.** The association shall issue to each insurer paying an assessment under sec-

tions 61B.01 to 61B.16, other than a class A assessment, a certificate of contribution, in a form prescribed by the commissioner, for the amount of the assessment paid. All outstanding certificates shall be of equal dignity and priority. A certificate of contribution may be shown by the insurer in its financial statement as an admitted asset in the form and for the amount and period of time as the commissioner may approve.

61B.08 PLAN OF OPERATION.

Subdivision 1. **Adoption and amendment.** (a) The association shall submit to the commissioner a plan of operation and amendments thereto, as necessary or suitable to assure the fair, reasonable, and equitable administration of the association. The plan of operation and amendments thereto shall be effective upon approval in writing by the commissioner.

(b) If the association fails to submit a suitable plan of operation within 180 days after May 27, 1977 or if at any time thereafter the association fails to submit suitable amendments to the plan, the commissioner shall, after notice and hearing, adopt and promulgate reasonable rules as necessary or advisable to effectuate the provisions of sections 61B.01 to 61B.16. The rules shall continue in force until modified by the commissioner or superseded by a plan submitted by the association and approved by the commissioner. If the commissioner finds that the operation of the association will be unreasonably delayed or impaired by compliance with the rule making requirements of section 14.14, subdivision 1, the commissioner may promulgate emergency rules in accordance with sections 14.29 to 14.36.

Subd. 2. **Compliance.** All member insurers shall comply with the plan of operation.

Subd. 3. **Contents.** The plan of operation shall:

(a) Establish procedures for handling the assets of the association;

(b) Establish the amount and method of reimbursing members of the board of directors;

(c) Establish regular places and times for meetings of the board of directors;

(d) Establish procedures for maintaining records of all financial transactions of the association, its agents, and the board of directors;

(e) Establish the procedures for making selections for the board of directors and submitting them to the commissioner;

(f) Establish additional procedures for assessments under section 61B.07;

(g) Establish procedures for employing or retaining persons necessary to handle the financial transactions and other necessary and proper functions of the association; and

(h) Contain additional provisions necessary or proper for the execution of the powers and duties of the association.

Subd. 4. **Delegation of powers and duties.** The plan of operation may provide that any or all powers and duties of the association, except those authorized under sections 61B.06, subdivision 9, clause (c), and 61B.07, are delegated to another organization which performs or will perform functions similar to those of the association in two or more states. The other organization shall be reimbursed for any payments made on behalf of the association and paid for its performance of any association function. A delegation shall take effect only with the approval of both the board of directors and the commissioner, and may be made only to an organization which extends protection substantially as favorable and effective as that provided by sections 61B.01 to 61B.16.

61B.09 DUTIES AND POWERS OF THE COMMISSIONER.

Subdivision 1. The commissioner shall:

(1) Notify the board of directors of the existence of an impaired insurer within three days after a determination of impairment is made or the commissioner receives notice of impairment;

(2) Upon request of the board of directors, provide the association with a statement of the premiums in the appropriate states for each member insurer; and

(3) When an impairment is declared and the amount determined, serve a demand upon the impaired insurer to make good the impairment within a reasonable time. Notice to the impaired insurer shall constitute notice to its shareholders. The failure of the insurer to promptly comply with the demand shall not excuse the association from performance under sections 61B.01 to 61B.16.

Subd. 2. The commisioner may, after notice and hearing, suspend or revoke the certificate of authority to transact insurance in this state of any member insurer which fails to pay an assessment when due or to comply with the plan of operation. As an alternative, the commissioner may levy a forfeiture on any member insurer which fails to pay an assessment when due. A forfeiture shall not exceed five percent of the unpaid assessment per month, but no forfeiture shall be less than $100 per month.

Subd. 3. Any action of the board of directors or the association may be appealed to the commissioner within 30 days of the notice of the action. Any final action or order of the commissioner shall be subject to judicial review in a court of competent jurisdiction, in the manner provided by chapter 14. In lieu of the appeal to the commissioner under this subdivision, a claimant may seek judicial review of the board's actions.

Subd. 4. The liquidator, rehabilitator, or conservator of any impaired insurer may notify all interested persons of the effect of sections 61B.01 to 61B.16.

61B.10 PREVENTION OF IMPAIRMENTS.

To aid in the detection and prevention of insurer impairments:

(a) The board of directors may, upon majority vote, notify the commissioner of commerce indicating that a member insurer may be unable or potentially unable to fulfill its contractual obligations.

(b) The board of directors may, upon majority vote, request that the commissioner order an examination of any member insurer which the board believes may be unable or potentially unable to fulfill its contractual obligations. The commissioner may conduct the examination. The examination may be conducted as a national association of insurance commissioners examination or by persons the commissioner designates. The cost of the examination shall be paid by the association and the examination report treated as are other examination reports. In no event shall the examination report be released to the board of directors of the association prior to its release to the public, but this shall not excuse the commissioner from the obligation to comply with clause (c). The commissioner shall notify the board of directors when the examination is completed. The request for an examination shall be kept on file by the commissioner, but shall not be open to public inspection prior to the release of the examination report to the public and shall be released at that time only if the examination discloses that the examined insurer is unable or potentially unable to meet its contractual obligations.

(c) The commissioner shall report to the board of directors when the commissioner has reasonable cause to believe that any member insurer examined at the request

of the board of directors may be unable or potentially unable to fulfill its contractual obligations.

(d) The board of directors may, upon majority vote, make report and recommendations to the commissioner upon any matter germane to the solvency, liquidation, rehabilitation or conservation of any member insurer. The reports and recommendations shall not be considered public documents.

(e) The board of directors may, upon majority vote, make recommendations to the commissioner for the detection and prevention of insurer impairments.

(f) The board of directors may, at the conclusion of any insurer impairment in which the association carried out its duties or exercised powers under sections 61B.01 to 61B.16, prepare a report on the history and causes of the impairment, based on the information available to the association, and submit the report to the commissioner.

61B.11 DELEGATION BY COMMISSIONER.

For the purposes of sections 61B.01 to 61B.16, the commissioner may delegate any of the powers conferred by law.

61B.12 MISCELLANEOUS PROVISIONS.

Subdivision 1. **Construction.** Nothing in sections 61B.01 to 61B.16 shall be construed to reduce the liability for unpaid assessments of the insureds of an impaired insurer operating under a plan with assessment liability.

Subd. 2. **Records.** Records shall be kept of all negotiations and meetings in which the association or its representatives are involved to discuss the activities of the association in carrying out its powers and duties under section 61B.06. Records of negotiations or meetings shall be made public only upon termination of a liquidation, rehabilitation, or conservation proceeding involving an impaired insurer, termination of the impairment of the

insurer, or order of a court of competent jurisdiction. Nothing in this subdivision shall limit the duty of the association to render a report of its activities under section 61B.13.

Subd. 3. **Association as creditor.** For the purpose of carrying out its obligations under sections 61B.01 to 61B.16, the association shall be deemed to be a creditor of the impaired insurer to the extent of assets attributable to covered policies reduced by any amounts to which the association is entitled as subrogee pursuant to section 61B.06, subdivision 7. All assets of the impaired insurer attributable to covered policies shall be used to continue all covered policies and pay all contractual obligations of the impaired insurer as required by sections 61B.01 to 61B.16. Assets attributable to covered policies, as used in this subdivision, means that proportion of the assets which the reserves that should have been established for the policies bear to the reserve that should have been established for all policies of insurance written by the impaired insurer.

Subd. 4. **Distribution to stockholders.** No distribution to stockholders of an impaired insurer shall be made until the total amount of assessments levied by the association with respect to the insurer have been fully recovered by the association.

Subd. 5. **Prohibited sales practice.** No person shall make use of the protection afforded by sections 61B.01 to 61B.16 in the sale of insurance. Any person violating this section shall be guilty of a misdemeanor.*

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* [Text of subd. 6 as amended by Laws 1991, c. 325, art. 5, §§ 4, 5.]

Subd. 6. **Notice concerning limitations and exclusions.** On and after January 1, 1992, no person, including an insurer, agent, or affiliate of an insurer or agent, shall offer for sale in this state a covered life insurance, annuity, or health insurance policy or contract without delivering at the time of application for that policy or contract a separate notice in the form the commissioner from time to time may approve for use in this state relating to

61B.13 EXAMINATION OF THE ASSOCIATION; ANNUAL REPORT.

The association shall be subject to examination and regulation by the commissioner. The board of directors shall submit to the commissioner, before May 1 each year, a financial report for the preceding calendar year in a form approved by the commissioner and a report of its activities during the preceding calendar year.

61B.14 TAX EXEMPTIONS.

Subdivision 1. **State fees and taxes.** The association shall be exempt from payment of all fees and all taxes levied by this state or any of its subdivisions, except taxes levied on real property.

Subd. 2. **Federal and foreign state taxes.** The association may seek exemption from payment of all fees and taxes levied by the federal or any other state government or any subdivisions thereof.

61B.15 INDEMNIFICATION.

The association has authority to indemnify certain persons against certain expenses and liabilities as provided in section 300.083 including the power to purchase and maintain insurance on behalf of these persons as provided by section 300.083, subdivision 7. In applying section

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coverage provided by the Minnesota Life and Health Insurance Guaranty Association. The notice must be signed by the applicant and kept on file by the person offering the policy or contract for sale. A copy of the signed notice must be given to the applicant.

Subd. 7. Effect of notice. The distribution, delivery, or contents or interpretation of the notice described in subdivision 6 shall not mean that either the policy or contract, or the owner or holder thereof, would be covered in the event of the impairment of a member insurer if coverage is not otherwise provided by this chapter. Failure to receive the notice does not give the policyholder, contract holder, certificate holder, insured, owner, beneficiaries, assignees, or payees any greater rights than those provided by this chapter.

300.083 for this purpose, the term "member insurers" shall be substituted for the terms "shareholders" and "stockholders" and the term "association" shall be substituted for the term "corporation."

61B.16 STAY OF PROCEEDINGS; REOPENING DEFAULT JUDGMENTS.

All proceedings in which the impaired insurer is a party in a court in this state shall be stayed 60 days from the date that a final order of liquidation, rehabilitation or conservation is entered as to the impaired insurer, to permit legal action by the association on any matters germane to its powers or duties. The association may, at any time when an insurer is an impaired insurer, apply to have a judgment under a decision, order, verdict, or finding based on default of the impaired insurer set aside by the court that made the judgment and shall be permitted to defend against the suit on the merits.

APPENDIX H

HONEYWELL INC.
Subsidiaries and Affiliates
(1-99% Ownership)

BRAZIL: Embrasid S. A.
CANADA: Comcept Canada Inc.
CHINA: Beijing Yamatake-Sic Control Systems Co., Ltd.
CHINA: Dalian Yamatake Control Instruments Co., Ltd.
CHINA: Shanghai Yamatake-Sic Building Automation Co., Ltd.
CHINA: Shanghai Yamatake Jinshan Control Instruments Co., Ltd.
CHINA: Sinopec Honeywell (Tianjin) Limited
INDIA: Honeywell India Ltd.
INDIA: Tata Honeywell Limited
ITALY: S.C. Alenia—Honeywell S.p.A.
ITALY: Sinted S.p.A.
JAPAN: NEC-Honeywell Space Systems Ltd. ("NHSS")
JAPAN: Yamatake—Honeywell Co., Ltd.
JAPAN: Taishin Co., Ltd.
JAPAN: Yamatake & Co., Ltd.
JAPAN: Yamatake Keiso Co., Ltd.
JAPAN: Yamatake Engineering Co., Ltd.
JAPAN: Yamatake Control Products Co., Ltd.
JAPAN: Yamatake Techno-Systems Co., Ltd.
KOREA: LG-Honeywell Company, Ltd.
KUWAIT: Honeywell Kuwait K.S.C.
MALAYSIA: Berkat Honeywell SDN BHD
NETHERLANDS: Cara C' Air B.V.
NETHERLANDS: Turnkiek Process Control B.V.
NORWAY: Nord Ventilasjon A/S
OMAN: Honeywell & Co., Oman L.L.C.
RUSSIA: Honeywell-STERCH Industrial Controls
SAUDI ARABIA: Honeywell Turki-Arabia Limited
SAUDI ARABIA: Saudi Arabian Tetra Tech Limited
THAILAND: Yamatake-Honeywell (Thailand) Co., Ltd.

TURKEY: Honeywell Otomasyon ve Kontrol Sistemleri Sanayi ve Ticaret A.S.
UKRAINE: Honeywell Ltd.
USA: Foster/Honeywell Joint Venture
USA: GE/Micro Switch Control Inc., a Joint Venture
USA: Kenwood Properties Inc.
USA: YCV Corporation

(2)

Supreme Court, U.S.
FILED
JUL 28 1997
CLERK

No. 97-9

In the

Supreme Court of the United States

October Term, 1997

HONEYWELL, INC.; HONEYWELL PENSION AND RETIREMENT COMMITTEE, on their own behalf and on behalf of the Honeywell Retirement Investment Plan, Investment Plus Plan of Honeywell, Inc., and Honeywell Retirement Savings Plan; and FIRST TRUST NATIONAL ASSOCIATION,

Petitioners,

v.

MINNESOTA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether retroactive amendment of a state insurance guaranty association statute to specifically address coverage of an insurance product not previously addressed in the statute violates the Contract or Due Process clauses of the U.S. Constitution.

Whether a state insurance guaranty association statute creates contractual rights subject to the Contract Clause, where insurance purchasers have no contractual relationship with either the state or the association, where the state is not obligated by the statute, and where the terms of the statute are not incorporated into the insurance contract between the purchaser and the insolvent insurer.

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SUMMARY OF ARGUMENT

In 1991, a record 12 insurance companies operating in the state of Minnesota failed, jeopardizing more than $440 million belonging to over 46,000 Minnesota residents.

Through employer-sponsored defined contribution pension plans, over 19,000 Minnesota residents had invested in Guaranteed Investment Contracts ("GICs") issued by several of these insolvent companies. When these companies failed, the employers froze the retirement accounts of affected employees.

When the companies failed, the Minnesota insurance guaranty association statute, like the Model Act upon which it was based, was silent with respect to whether, or how, the statute applied to pension-GICs, and the state guaranty association was receiving conflicting claims from plan trustees and plan participants concerning how pension-GICs should be covered. No other state was acknowledging coverage of over 11,000 Minnesota residents employed by companies with non-Minnesota pension plan trustees.

Into this breach stepped the Minnesota Legislature, which in April of 1992 amended the Minnesota insurance guaranty association statute to specifically provide that 1) pension- GICs were covered by the Act, and 2) benefits under the Act were based on the residence of the individual Minnesota residents whose funds were invested in the GICs, not the residence of the trust companies which merely held the GICs in a fiduciary capacity.

The purpose of the Amendment was to assure that limited state guaranty association resources would flow solely to the Minnesota residents whose funds were at risk, not to local trust companies and their non-resident beneficiaries.

Because the statute did not previously address coverage of pension-GICs, the Legislature expressly stated that the amendment was intended to clarify the Act, and to apply to all insolvencies, including insolvencies declared prior to passage of the Amendment.

Honeywell, a multinational corporation headquartered in Minnesota, whose pension plans held GICs issued by insolvent Executive Life Insurance Company of California ("ELIC"), commenced this action to challenge the constitutionality of the 1992 Amendment, arguing that its Minnesota based trustee had a "contractual" right to coverage which was unconstitutionally "impaired" by the 1992 Amendment.

Honeywell's challenge has rightly been rejected by all courts which have heard it, including the district court, the Minnesota Supreme Court (on certified questions), and, finally, the Eighth Circuit Court of Appeals (en banc.).

Contrary to Honeywell's assertion in its Petition for Certiorari, the 1992 Amendment was not intended to improperly prefer the interests of a narrow group of claimants over those of Honeywell. As the Eighth Circuit found, the Act properly was designed to correct a significant, unanticipated gap in Guaranty Association coverage of Minnesota resident pension plan participants, and to avoid an unintended windfall to Minnesota based trust companies and their non-resident pension plan participants.

The Amendment most certainly did not, as Honeywell claims, "eliminate" protection for Honeywell's employees in connection with the ELIC insolvency. Under the Amendment, over 9000 of Honeywell's employees who are Minnesota residents will be protected.

Nor did the Amendment deprive Honeywell of bargained-for contractual rights. To the contrary, whatever rights the pre-amendment Act bestowed on Honeywell were purely statutory gratuities, and Honeywell had no bargained-for expectations concerning coverage of its ELIC GICs by the Minnesota Association. Honeywell concedes that the terms of the Minnesota Act were not incorporated into its ELIC GICs.

In upholding the Amendment the Court of Appeals closely followed controlling Supreme Court precedents. Honeywell cites no case in which this Court, or any other, overturned a retroactive modification of a state guaranty association statute on constitutional grounds. The Eighth Circuit's opinion in this case is not in conflict with the decision of any other court, much less one of this Court. Accordingly, this case does not present the Court with an opportunity to "settle" a significant area of federal law.

For these reasons, as discussed further below, the Association respectfully submits that this Court should deny Honeywell's Petition for a Writ of Certiorari.

STATEMENT OF CASE

A. The Executive Life Insolvency.

On December 6, 1991 the California Superior Court issued an order declaring Executive Life insolvent and ordering its liquidation. Guaranty Association Appendix ("GA"), filed with Court of Appeals, at 2. When Executive Life was declared insolvent, many employers froze the accounts of participants who had elected to invest in funds backed by Executive Life GICs. Approximately 19,000 Minnesota workers, employed by 16 different companies,

were in this situation. GA.8. Over half of the affected Minnesota employees were employed by companies without a Minnesota plan trustee. Id.

B. Guaranty Association Coverage of Pension-GICs: No Nationwide Uniformity.

The Minnesota Life & Health Insurance Guaranty Association Act ("Act"), passed in 1977, is one of fifty such insurance guaranty association statutes in the United States. These statutes are loosely patterned after the Model Life and Health Insurance Guaranty Association Act ("Model Act") of the National Association of Insurance Commissioners ("NAIC"). GA.5. Pursuant to the McCarran-Ferguson Act, the states, not the federal government, have exclusive regulatory responsibility for the insurance industry.[1] Under this state-by-state scheme, each state provides guaranty association benefits to its own residents affected by insurance company insolvencies.

Until its complete overhaul in 1993 after the Executive Life insolvency, the Minnesota Act was based on the 1971 and 1975 versions of the Model Act. GA.72, 88. Minn Stat. §61B.01 et seq.

Like these versions of the Model Act, the 1977 Minnesota Act did not mention pension-GICs. The Minnesota

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[1]The state's police powers in the area of insurance insolvency regulation pursuant to the McCarran-Ferguson Act are long-standing and well established. See 15 U.S.C. § 1012(a). See FTC v. Travelers Health Ass'n, 362 U.S. 293 (1960) (purpose of Section 1012 is to allay doubts as to power of states to regulate insurance); Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979); First Nat'l Bank v. Taylor, 907 F.2d 775 (8th Cir.), cert. denied, 498 U.S. 972 (1990).

Act simply obligated the Association in connection with "annuity contracts" owned by "residents", and limited liability of the Association to "$100,000 in cash values, or $300,000 for all benefits, including cash values, with respect to any one life." Minn Stat. §§61B.02, subd. 1; 61B.06, subd. 2; 61B.06, subd. 8, Pet. App. at 116a-125a. See also 1975 NAIC Model Act, §§3 (1); 8(3); 9. GA.88-93.

These provisions were clearly drafted with individual contracts owned by individual residents in mind. Not addressed was whether, or how, these provisions might apply to a contract held by a pension plan trustee for the benefit of employee-investors residing in many different states.

Indeed, the Minnesota Supreme Court explicitly found, in responding to certified questions from the District Court in this case, that pension-GICs were not prevalent at the time of the statute's enactment in 1977, and, therefore, that the "legislature likely did not contemplate how the Act specifically applied to these contracts." Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Ass'n, 518 N.W.2d 557, 561 (Minn. 1994).

In December, 1985, the Model Act was extensively revised, and specifically provided for coverage of "unallocated annuity contracts," defined as "any annuity contract or group annuity certificate which is not issued to and owned by an individual." 1985 Model Act, § 5(n), GA.109. The Model specifically provided for coverage of such contracts based upon the residence of the "contract holders." 1985 Model Act § 3(a)(2), GA.105. The Model Act further imposed a limit of $5 million with respect to any one contract holder, irrespective of the number of unallocated annuity contracts held by that contract holder. 1985 Model Act § 3(c)(2)(B), GA.107.

The 1985 Model Act revisions presumed that all states would enact these changes and thereby create a seamless nationwide system of pension-GIC coverage. Unfortunately, this system never materialized.

As of 1991, when Executive Life became insolvent, most states, including Minnesota, had not incorporated the Model Act changes regarding pension-GICs. GA.5, 68, 69. Many had expressly rejected the Model, and instead excluded coverage of pension-GICs altogether. GA.5, 68, 69. As noted above, Minnesota was still operating under the 1971-1975 Model language which did not specifically state whether, or how, pension-GICs were covered.[2]

Contrary to Honeywell's suggestion, as of 1991 no court had considered how coverage of pension-GICs was to be determined under the Minnesota Act. While Minnesota's intermediate appellate court ruled in 1987 that the Minnesota Act's definition of "annuity" encompassed guaranteed investment contracts issued to defined contribution pension plans, that case did not discuss how coverage of such contracts was determined. Minnesota Life and Health Insurance Guaranty Association v. Dept. of Commerce, 400 N.W.2d 769, 773-74 (Minn. App. 1987). At issue in the 1987 case was whether pension-GICs ought to be included in the base from which member insurers were to be assessed to cover the

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[2]In sum, in 1991 when Executive Life became insolvent, states generally fell into one of the following categories: 1) states with a "new" Model Act, including pension-GIC coverage based on residence of the trustee; 2) states with a "new" Model Act, specifically excluding coverage of pension-GICs; 3) states with an "old" Model Act, enacted prior to 1985; 4) states with no guaranty association statute; and 5) states with new guaranty association legislation, but without retroactive coverage of 1991 insolvencies.

Baldwin United insolvency. The court ruled in that case that such contracts were covered by the Act, even though not expressly identified as "covered contracts," because the general purpose of the Act was to "protect the future financial stability of individuals." Id. at 773. Accordingly, the court concluded that pension-GICs were "covered contracts" and should be included in the assessment base. Since Baldwin United issued only individual annuities, and did not issue any pension-GICs, that insolvency case did not involve any coverage issues relating to pension-GICs.

Thus, contrary to Honeywell's bald assertion, nothing in the 1987 case "adjudicated" the issue presented in this case, i.e., how pension-GIC coverage is determined, whether based on the residence of the trustee or upon residence of the plan participants. Indeed, contrary to Honeywell's assertion, the Minnesota Court of Appeals' 1987 opinion, rather than supporting trustee coverage, clearly pointed the way toward participant coverage, in its observation that the purpose of the Act was to "protect the future financial stability of individuals." Id. at 773 (emphasis supplied). The court pointedly found that it was "clear the legislature intended that those who place their money in pension funds be protected." Id. at 774 (emphasis added.) The court clearly recognized that the legislature intended to cover the individuals whose funds are used to purchase pension-GICs, not the trustees who merely hold the GICs in a fiduciary capacity. Nothing in this opinion suggested that the Act would be interpreted to confer coverage on residents of other states merely because their pension plans employed a Minnesota-based trustee, or to deprive Minnesota residents of the Act's protection merely because the trustee of their pension plans resided in another state.

C. The Minnesota Problem: Conflicting Pension-GIC Claims.

As noted above, most of the 19,000 Minnesota residents whose accounts were frozen when Executive Life was declared insolvent were employed by companies with pension plan trustees not based in Minnesota. Unisys, for example, which employed approximately 7,500 Minnesota residents who had contributed to Unisys' pension-GIC backed retirement accounts, had a Pennsylvania-based trustee. GA.54. Pennsylvania, like Minnesota, had not incorportated the Model Act GIC provisions. GA.5, 68, 69. Approximately 350 Minnesota residents were employed by Xerox, which used a Massachusetts-based trustee. GA.2, 3, 57. Massachusetts had expressly excluded coverage of pension-GICs. GA.5, 68-69. About 9,000 residents were employed by Honeywell, with a Minneapolis-based trustee. GA.42.

Shortly after the announcement of the Executive Life insolvency, Unisys and Honeywell both demanded coverage from the Guaranty Association. Unisys sought coverage for its 7,500 Minnesota residents, based on the theory that the covered "ownership interest" was that of the resident participant, and that the residence of the trustee was irrelevant. Honeywell sought coverage for all of its approximately 35,000 employees worldwide, based on the fact that the trustee of its plans resided in Minnesota at the time of the insolvency. GA.3.[3]

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[3]Honeywell provides no support for its assertion that Honeywell was the only company with a Minnesota-based trustee affected by the 1992 Amendment. While at the time of the District Court proceedings Honeywell was the only company with a Minnesota-based trustee which had filed a claim against the Association in connection with ELIC pension-GICs, the Association has subsequently received claims from several other Minnesota-based trustees, including The Toro Company, the law firm of Fabyanske Svoboda Westra &

At the time of the Amendment, coverage of the ELIC pension-GICs, whether by Minnesota or any other state Association, was very much in doubt. As noted above, Minnesota fell into "Category 3," a state with a guaranty association act based on the pre-1985 Model, which did not specifically address pension-GIC coverage. The Pennsylvania Act was also "Category 3," based on the pre-1985 Model. GA.146. The Pennsylvania Life and Health Insurance Guaranty Association took the position that GICs were not covered at all by their Act because they were not a covered form of "annuity." GA.126-144. The Pennsylvania Department of Insurance maintained that GICs were covered, but still took the view that only Pennsylvania resident participants were entitled to coverage. GA.139-141.[4]

Moreover, the Minnesota Court of Appeals' 1987 ruling that GICs were "annuities" under the Minnesota statute remained subject to question at the time of the ELIC insolvency, and the possibility remained that the Minnesota Supreme Court might eventually rule, contrary to the court of appeals, that GICs were not covered at all by the 1977 Act. Some states have ruled that pension-GICs are not "annuities" within the meaning of the original Model Act language.[5]

Hart, P.A., and others. These trustees were affected by the 1992 Amendment in the same way that Honeywell was affected. In addition, the Amendment by its terms applies to several other insolvencies declared in 1991, including the insolvency of Mutual Benefit Life Insurance Company and InterAmerican Life Insurance Company, both of which had also sold pension-GICs to Minnesota trustees.

[4] The Pennsylvania Supreme Court ultimately adopted this view. See Unisys Corp. v. Pennsylvania Life & Health Ins. Guar. Ass'n, 667 A.2d 1199 (Pa. Commw. Ct.), aff'd 684 A.2d 546 (Pa. 1996).

[5] See, e.g., Arizona Life & Disability Ins. Guar. Fund v. Honeywell, Inc., 927 P.2d 806 (Ariz. Ct. App. 1996), review granted (Nov. 19, 1996); First Trust Nat'l Ass'n v. New Mexico Life Insurance Guaranty Association (N.M. Ct.

With over 7,500 Minnesota resident Unisys employees without coverage from the Pennsylvania Association, and with the fate of thousands of other residents unknown, On January 21, 1992, the Minnesota Commerce Department issued an opinion setting forth its view concerning whether and how the Act covered pension-GICs. The Department of Commerce is the agency charged with regulation of the Association. Minn. Stat. § 61B.04, subd. 4.

The Department determined that pension-GICs were, in fact, covered by the Act, and that coverage under the Act was intended to be determined by the residence of the plan participants, not that of the plan trustees. After administrative conferences with representatives of Honeywell, Unisys, the Minnesota Association, and others, the Department of Commerce issued a written opinion concerning coverage by the Minnesota Association of the Executive Life pension contracts. The Department opinion concluded that:

> [I]t is the clear intent of the Act to cover the people of Minnesota. Accordingly it is the Department's position that the Guaranty Association Act provides coverage to Minnesota resident employees who are beneficiaries of defined-contribution pension plans funded by Guaranteed Investment Contracts purchased from Executive Life.
>
> Consistent with that position, the Department has determined that non-resident employees of such a

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App., July 7, 1997) (reproduced at Respondent's Appendix, A-1-A-13.) Indeed, in First Trust, the New Mexico Court of Appeals ruled that it was "clear" that Honeywell's pension-GICs were not "annuities" and therefore not covered by the New Mexico guaranty association. Id, slip op at 11, A-12.

plan, regardless of the residency of the trustee or plan sponsor, are not covered under the Act.

GA.59, 159, 164 (emphasis added).

Minnesota Department of Commerce Commissioner Bert J. McKasy discussed the pension-GIC problem in testimony before the United States Congress on April 28, 1992. GA.171. According to Commissioner McKasy, in Minnesota alone approximately 46,000 residents had invested more than $440 million in 12 life insurance companies which had been taken over by regulators in 1991. GA.172.

Commissioner McKasy testified at length regarding the pressing need to clarify the Act's application to pension-GICs issued by these defunct companies. "Current Minnesota statutes, " according to McKasy, "do not specifically address GICs." GA.175. McKasy explained to Congress that Minnesota statutes were "unclear about protection for certain products, and in some cases the limits of coverage for other products are undefined." He explained that "over the years, new products have been developed and old products have been reshaped, but state laws have not been updated to reflect these changes." Pension-GICs, according to McKasy, were a "case in point."

McKasy described the Honeywell-Unisys situation in particular as a situation involving "GIC coverage issues affecting many other states," including "are GICs covered? If so, who is covered -- employees, employer, or trustee? And, up to what limits?"

McKasy explained the conclusion of the Minnesota Department of Commerce that "coverage applies to

employees, up to $100,000 per person, who at the time of impairment were residents of Minnesota." He opined that "unless other states take similar positions, significant questions will remain [such as] [w]ill Honeywell employees living and working in other states be covered by those states?" Commissioner McKasy made clear that the Department's interpretation of the statute "excludes [non-resident Honeywell employees] from coverage under the Minnesota Guaranty Association."

On April 27, 1992 the Minnesota Legislature ratified the ruling of the Commerce Department, amending the language of the Act to provide that the Act only covers individual participants in defined contribution pension plans who are residents of the state of Minnesota. Minn. Stat. § 61B.03, subd. 5(c) (West Supp. 1993). The Legislature expressly provided that the amendment to the Act was intended to clarify existing law, and applied to "all covered policies or contracts issued or renewed by insurers which become insolvent after May 27, 1977." 1992 Minn. Laws, ch. 540, art. 2, § 23.[6]

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[6]The following year, the Minnesota Legislature comprehensively overhauled the Minnesota Act, again specifically rejecting "contract holder" coverage regarding pension-GICs as contained in the Model Act. The current Minnesota law continues to determine coverage based upon the residency of the plan participant, not that of the plan trustee or contract holder, limits coverage to $100,000 per participant, and further establishes an overall cap of $7.5 million. See Minn. Stat. §61B.19, subd. 3(5). The 1993 legislation reiterated that the Executive Life and all other insolvencies, rehabilitations, or impairments prior to its effective date remained subject to the law in effect in 1992. 1993 Minn. Laws, ch. 319, § 19.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY FOLLOWED MODERN DUE PROCESS AND CONTRACT CLAUSE BALANCING TESTS.

A. Modern Standards Applicable to Retroactive Laws.

Stripped to its essential core, Honeywell's Petition is based on a long discarded theory of constitutional law: that the Constitution prohibits a state from modifying its statutes if the modification adversely impacts a citizen's economic expectations under the original law.

In upholding the Amendment, the Court of Appeals rejected Honeywell's anachronistic absolutist approach. Rather, it followed this Court's modern directives that laws do not receive "heightened" scrutiny where economic relations are involved; instead, even though the law might upset otherwise "settled expectations," constitutional guarantees of due process require only that a law be a reasonable means to a permissible objective. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15-16 (1976).

Legislative choices concerning the means to achieve legitimate public policy objectives are entitled to "strong deference." Concrete Pipe & Prods. v. Construction Laborers Pension Trust, 113 S.Ct. 2264, 2286-88 (1993); Usery, 428 U.S. at 15-16 (1976). This deference and minimum scrutiny are required whether a statute is prospective or retroactive. United States v. Carlton, 114 S.Ct. 2018, 2022 (1994); Usery, 428 U.S. at 15-16; Pension Benefit Guaranty Corp. v. R.A. Gray & Co.,

467 U.S. 717, 729 (1984); Concrete Pipe & Prods., 113 S.Ct. at 2286-88.[7]

Even when a statute retroactively impairs contractual rights, and even when that impairment is substantial, the law is permissible so long as it is supported by a "significant and legitimate public purpose" and if the means selected by the legislature to accomplish its purpose are "reasonable and appropriate." Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411-412 (1983).

Legislative acts adjusting the burdens and benefits of economic life come to a reviewing court with a presumption of constitutionality, and the burden is on one complaining of a due process violation to establish that the legislature has acted in an "arbitrary" and "irrational" way. Usery, 428 U.S. at 15-16. The Court of Appeals correctly found that Honeywell had failed to carry this burden.

In rejecting Honeywell's claims, the Court of Appeals properly relied upon General Motors Corp. v. Romein, 503 U.S. 181, 185, 190-191 (1992), in which this Court confirmed that retroactive statutory regulation of employer-sponsored employee benefits is not subject to any greater scrutiny than the general due process standard.

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[7] See also Landgraf v. USI Film Products, 114 S.Ct. 1483, 1501 (1994) ("the constitutional impediments to retroactive civil legislation are now modest. . . ."); Rivers v. Roadway Express, Inc., 114 S.Ct. 1510, 1519 (1994) (legislature has power to amend statute that it believes court has misconstrued, and "may even, within broad constitutional bounds, make such a change retroactive and thereby undo what it perceives to be the undesirable past consequences of a misinterpretation of its work product.")

In Romein, this Court unanimously rejected Contract Clause and Due Process objections to a 1987 Michigan statute which required employers to pay worker's compensation benefits which they had withheld in reliance upon a previous court opinion construing a 1981 worker's compensation statute.

This Court rejected the employers' contention that the Court must "read every workplace regulation into the private contractual arrangements of employers and employees." 503 U.S. at 190. The Court found that such a construction would "severely limit the ability of state legislatures to amend their regulatory legislation." Id.. The Court found that the retroactive aspects of the law satisfied the deferential standard articulated in Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984). The Court held that the retroactive amendment was supported by the "legitimate legislative purpose" of "correct[ing] the unexpected results of the Michigan Supreme Court's Chambers opinion." Id.

The Court of Appeals below also properly relied upon United States v. Carlton, in which this Court unanimously upheld a retroactive amendment to 26 U.S.C. § 2057 governing the estate tax deductibility of sales by an executor of employer securities to an employee stock ownership plan (ESOP). The Court applied the "rational basis" standard applied in Usery.[8] The Court found that the amendment was adopted as a "curative measure" to address a fact pattern not anticipated when the original legislation was passed. 114 S.Ct. at 2022. This Court concluded that in view of the unintended results from the earlier legislation, the amendment was "neither illegitimate nor arbitrary." Id. at 2023. The Court found that "Congress acted

[8]The Court specifically ruled that the due process standard applicable to retroactive tax legislation is the same as that applicable to any other kind of legislation. Id. at 2022.

to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss." Id.

Contrary to Honeywell's assertion, the Amendment in no sense "cancelled debts unambiguously owed" to Honeywell. Statutory rights have long been held subject to retroactive modification without implicating "vested rights.". See, Flemming v. Nestor, 363 U.S. 603, 611 (1960) (retroactive amendment of the Social Security Act terminating old-age benefits for non-U.S. residents after plaintiff had become eligible did not violate the due process clause); Phelps v. Board of Education, 300 U.S. 319 (1937) (state law establishing tenure for a certain class of teachers could be retroactively modified without offending the Contract Clause because the teachers' rights were statutory, not contractual.)[9]

Moreover, unbroken precedent dictates that statutory rights do not become "vested" until they are reduced to a final, non-appealable judgment. See Hodges v. Snyder, 261 U.S. 600, 602-603 (1923) (curative acts which take effect prior to judgment do not offend due process); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801) ("if subsequent to the judgment and before the decision of the appellate court, a law

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[9]Indeed, in a decision issued within days of its opinion in this case, the Minnesota Supreme Court directly ruled that notions of "vested rights" have no applicability in connection with Guaranty Association legislation. See, Maxwell Communications v. Webb Publishing Co., 518 N.W.2d 830, 832-34 (Minn. 1994). Accord, Reinsurance Association v. Dunbar Kapple, Inc., 443 N.W.2d 242 (Minn. Ct. App. 1989), amendment to the Minnesota Insurance Guaranty Association Act (MIGA) (a guaranty association similar to Respondent, but for property and casualty insurers) which applied retroactively to actions commenced prior to its passage did not unconstitutionally impair vested rights.)

intervenes and positively changes the rule which governs, the law must be obeyed").[10]

B. The Court of Appeals Properly Held that Coombes and Ettor are Distinguishable and of Doubtful Weight.

Honeywell argues that the Court of Appeals failed to give proper weight to certain Supreme Court cases, in particular Coombes v. Getz, 285 U.S. 434 (1932) and Ettor v. Tacoma, 228 U.S. 148 (1913). To the contrary, the Court of Appeals properly distinguished these cases: they are not controlling and do not require overturning the Amendment.

In Coombes, the Supreme Court struck down the repeal of a California constitutional provision which had made corporate directors responsible for misappropriation of corporate funds by officers. The Court held that the repeal could not be applied retroactively because the rights were "contractual" in nature.

In Coombes, however, the "contractual" nature of the state law was not part of the United States Supreme Court's own finding, but was based upon the California Supreme Court's peculiar characterization of the particular rights. The United

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[10]See also New York Cent. R.R. Co. v. White, 243 U.S. 188, 198 (1917)("no person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit."); 149 Madison Ave. Corp. v. Asselta, 331 U.S. 795 (1947), modifying 331 U.S. 199 (1947) (upholding amendment to the Fair Labor Standards Act retroactively depriving workers of accrued right to overtime pay. McCullough v. Virginia, 172 U.S. 102, 123-24 (1898) ("[I]t is not within the power of the legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when these actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases."); Landgraf v. USI Film Products, 114 S.Ct. 1483,1501 (1994)(citing Schooner Peggy with approval as support for proposition that "a Court should 'apply the law in effect at the time it renders its decision' . . . even though that law was enacted after the events that gave rise to the suit.)

States Supreme Court specifically relied on the fact that "it was conceded that the liability created by the [California] Constitution was in its nature contractual and, as a matter of law, entered into and became a part of every contract between the corporation and its creditors." 285 U.S. at 440 (emphasis added).[11] Here, in stark contrast, the contractual nature of the Guaranty Association Act is far from "conceded;" to the contrary, Honeywell has conceded that the Minnesota Act was not an implied term of the Executive Life GICs. Honeywell Brief Filed in Minnesota Supreme Court on Certified Questions, dated February 22, 1994, at 33. ("Plaintiffs have never claimed the Act becomes an implied term in the Executive Life GICs.").

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[11]The Minnesota Guaranty Association Act is far different from the corporate charter at issue in Coombes. Beginning with the landmark case of Dartmouth College v. Woodward, 17 U.S. 518 (4 Wheat.) (1819) corporate charters granted by a state were viewed as a unique type of contract and therefore subject to judicial oversight through the Contract Clause. See John E. Nowak and Ronald D. Rotunda, Constitutional Law 397-800 (4th ed. 1991) ("Nowak & Rotunda"). Guaranty Association laws, by contrast, are widely viewed as purely statutory in nature. See, e.g., Honeywell 518 N.W.2d at 561; Folson Pitts v. Mobile Tank Car Servs., Inc., Nos. 62927, 62928, 62929, 1993 WL 398564 (Ohio Ct. App. Oct. 7,1993) (right to file claim against Ohio Insurance Guaranty Association ("OIGA") is "a limited, statutorily-created right," not a "substantive right"); Pennsylvania Life & Health Ins. Guar. Ass'n v. Superior Court, 27 Cal. Rptr. 507, 513 (Cal. Ct. App. 1994) ("extent of the Guaranty Association's liability `is strictly restricted to statutorily-defined covered claims' and therefore its obligations are not necessarily coextensive with the insolvent insurer"); Isaacson v. California Ins. Guar. Ass'n, 150 P.2d 297 (Cal. 1988) (rejecting argument that California Insurance Guaranty Association is "assignee" of failed insurer or "stands in the shoes" of an insurer for all purposes, holding that CIGA could not be held liable for statutory or common law bad faith or intentional infliction of emotional distress in connection with claims adjustment activities); City of Greensboro v. Reserve Ins. Co., 321 S.E.2d 232, 240 (N.C. Ct. App. 1984); Virginia Property & Casualty Ins. Guar. Ass'n v. International Ins. Co., 385 S.E.2d 614 (Va. 1989).

See also Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Ass'n., 518 N.W.2d 557, 561 (Minn. 1994), n.14.[12]

Moreover, unlike in Coombes, the Minnesota Supreme Court, in response to the District Court's certified questions, held that as a matter of Minnesota law Guaranty Association rights are not contractual but are purely statutory. Id.[13]

Nor is Ettor v. Tacoma, 228 U.S. 148 (1913) controlling. In Ettor a governmental body sought to retroactively extricate itself from a statutory liability based on the city's taking of private property for a public purpose. Thus, Ettor is similar to U.S. Trust Co. v. New Jersey, 431 U.S. 1 (1977) in which the Supreme Court rejected an attempt by the State of New Jersey to repeal a statutory covenant obligating it in connection with certain bonds issued by a port authority. In U.S. Trust, the Court held that because the state's "self interest" was at stake, the retroactive legislation was not entitled to the "complete

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[12]The narrow reach of Coombes is evident in Phelps v. Board of Education, 300 U.S. 319 (1937), decided only three years after Coombes. In Phelps, this Court ruled that a state law establishing tenure for a certain class of teachers could be retroactively modified without offending the Contract Clause because the teachers' rights were statutory, not contractual, thus distinguishing Coombes.

[13]Indeed, the Coombes Court itself carefully distinguished a line of cases which held that retroactive repeal of statutory rights was not unconstitutional. In each, the Court noted that the rights had been conclusively defined by the state court as statutory as opposed to contractual. Coombes, 285 U.S. at 446-7, distinguishing Moss v. Smith, 155 P. 90 (Cal. 1916)("The distinction between the section of the Code [in Moss] and the constitutional provision [in Coombes], therefore, is clear. In the former the liability is wholly statutory; in the latter it is contractual."); and distinguishing Willcox v. Edwards, 123 P. 276 (Cal. 1912) (State constitutional provision legalizing contracts for the sale of stocks on margin did not create a "vested right" but rather one dependent solely upon the constitutional provision, and therefore subject to retroactive repeal.).

deference" to which ordinary legislation is entitled. Id. at 26. Here, unlike Ettor or U.S. Trust, the Guaranty Association Act does not involve retroactive modification of a state obligation, a taking by the state of private property, or the creation of corresponding rights to compensation against the state. Benefits payable by the Association come directly from the private sector; no public funds are involved. Guaranty Association legislation is merely economic legislation addressing economic rights and obligations of private parties, and, therefore, is not subject to the strict scrutiny applied in U.S. Trust and Ettor.

In neither Ettor nor Coombes did the Court conduct the means-ends analysis required under modern due process and contract clause tests. For this reason, in addition to distinguishing Coombes and Ettor, the lead opinion below questioned whether the reasoning of these cases should be followed in light of the modern precedents. The lead opinion observed that these cases "were decided during what is referred to in the history of American jurisprudence as the Lochner era, named for the pivotal case of judicial activism, Lochner v. New York, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (invalidating maximum work hours legislation as an unconstitutional exercise of police power)." Petitioner's App. at 12a. Judge Hansen wrote that "cases of that era frequently invalidated statutes that limited economic autonomy in a manner thought by the Court to be unnecessary or unwise, but in more recent decisions, the Court plainly sees its role differently." Id. He observed that "within two years of the Coombes decision, substantive due process analysis in the area of retroactive economic legislation began to be framed in terms of reasonableness, drifting away from the Lochner era's strict protection of economic freedom and vested rights." Petitioner's App. 13a., quoting Home Building & Loan Ass'n v.

Blaisdell, 290 U.S 398, 438 (1934).[14] The opinion then added its voice to those who "question the continued validity of the vested rights analysis of Coombes and Ettor when reviewing the constitutionality of economic legislation. . . ." Petitioner's App. at 14a.[15]

The fact that in addition to distinguishing Coombes and Ettor the lead opinion questioned the continuing validity of the constitutional theory underpinning them in no way violated the rules set forth in Rodriguez De Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484-85 (1989). That rule, prohibiting a Court of Appeals from declining to follow a Supreme Court precedent which "appears to rest on reasons rejected in some other line of decisions," applies only where the case has "direct application" in a pending case. Id. at 484-85.

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[14]See also Carlton, 114 S.Ct. at 2023-24 (cases applying strict scrutiny of retroactive legislation "were decided during an era characterized by exacting review of economic legislation under an approach that 'has long since been discarded.'") (quoting Ferguson v. Skrupa, 372 U.S. 726, 730 (1963)); Gray, 467 U.S. at 733 (noting the "changes in judicial review of economic legislation" that has occurred in modern times, casting doubt on earlier decisions striking down economic legislation under the Due Process clause).

[15]In Blaisdell, the Court stressed that the Contract Clause is "not to be read with literal exactness like a mathematical formula, " 290 U.S. at 428, and that "the Court has sought to prevent the perversion of the clause through its use as an instrument to throttle the capacity of the states to protect their fundamental interests." Id. at 444. Honeywell's argument would do just what the Supreme Court warned against in Blaisdell. It would pervert the clause by using it as an instrument to thwart the capacity of the Minnesota legislature to protect fundamental interests of Minnesotans. A statute is a statute, and a contract is a contract. Unless the state itself is obligated by the statute, a statute is not a contract. State v. Brand, 303 U.S. 95, 58 S.Ct. 443 (1938); U.S. Trust Company of New York v. State of New Jersey, 431 U.S. 1, 97 S.Ct. 1505 (1977). To apply the Clause to a change in rights which are purely statutory is surely to "pervert" the clause.

In Rodriguez, this Court criticized the Fifth Circuit for failing to follow Wilko v. Swan, 346 U.S. 427 (1953) in which the Court held that claims under § 12(2) of the Securities Act were not subject to arbitration. In a case squarely on point with Wilko, the Fifth Circuit held that § 12(2) claims should be remanded to arbitration. Even though this Court affirmed the Fifth Circuit, concluding that Wilko was indeed wrongly decided, it criticized the Fifth Circuit's approach because Wilko had "direct application" to Rodriguez. Id. at 484.

Here, by contrast, neither Coombes, Ettor, nor any of the other cases upon which Honeywell relies in its petition involved retroactive amendment of a guaranty association statute. Indeed, it is fair to presume that the very notion of a "guaranty association" was not even a twinkle in the eyes of the authors of Ettor in 1913 or of Coombes in 1932. Thus, unlike in Rodriguez, none of cases upon which Honeywell relies has "direct application" to this case, and the Court of Appeals was correct in following more recent precedents. This Court has not cited Coombes since 1940, or Ettor since 1935.[16]

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[16]Numerous lower courts refused to follow Coombes or Ettor as authority for striking down retroactive legislation. See Hammond v. United States, 786 F.2d 8 (1st Cir. 1986) (upholding statute which retroactively abolished accrued claims under the Federal Tort Claims Act for injuries suffered as a result of atomic weapons testing, distinguishing Coombes and Ettor); Seese v. Bethlehem Steel Co., 168 F.2d 58, 60-64 (4th Cir. 1948); Moss v. Hawaiian Dredging Co., 187 F.2d 442 (9th Cir. 1951) (following Seese, and upholding retroactive amendments to the Fair Labor Standards Act, holding Ettor and Coombes inapplicable); Addison v. Huron Stevedoring Corp., 204 F.2d 88, 92, n.8 (2d Cir.), cert. denied, 346 U.S. 877 (1953) (following Moss). See also Sagastivelza v. Puerto Rico Hous. Auth., 195 F.2d 289, 292 (1st Cir. 1952) (upholding constitutionality of repeal of state Eminent Domain Act after condemnation proceeding had been instituted but before trial, holding Ettor, Coombes and Forbes, inapplicable; Taxpayers v. Animas-La Plata Water Conservancy Dist., 739 F.2d 1472, 1477 (10th Cir. 1984) (retrospective operation of state water conservancy statute did not impair "vested rights" in

In sum, contrary to Honeywell's assertion, the Court of Appeal's opinion is not in conflict with controlling Supreme Court authorities. To rule, as Honeywell requests, that one can obtain an immutable right in a statute prior to obtaining final judgment would be to overrule the long line of Supreme Court cases cited above which show precisely the opposite, and would place the kind of straight-jacket on the legislature about which this Court warned so clearly in Blaisdell, Gray, Romein, Carlton, and other cases.

II. GUARANTY ASSOCIATION RIGHTS ARE NOT CONTRACTUAL.

Honeywell contends that the Guaranty Association Act creates contractual rights, that retroactive modification of the Act is therefore subject to heightened scrutiny, and that the 1992 Amendment should have been struck down as violative of the Contract Clause. The lead opinion, however, together with the District Court and Minnesota Supreme Court, correctly rejected the notion that Guaranty Association statutes create contractual rights subject to Contract Clause protection.

"In general, a statute itself is treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State." U.S. Trust Co. v. New Jersey, 431 U.S. 1, 17, n.14 (1977) (emphasis supplied.). Here, the right to payment under the Act is not enforceable against the State of Minnesota but is an obligation imposed upon the Association, which is a private

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violation of due process, holding Coombes inapplicable; Sowell v. Am. Cyanamid Co., 888 F.2d 802, 805 (11th Cir. 1989) (upholding constitutionality of retroactive amendment to FELRTCA); Atmospheric Testing Litig., 820 F.2d 982, 988-89 (9th Cir. 1987), cert. denied, 485 U.S. 905 (1988) (upholding constitutionality of retroactive amendment to Federal Tort Claims Act).

non-profit entity, not a state agency. Minn. Stat. Ann. § 61B.04, subd. 1 (West 1986). Moreover, as the lead opinion observed, there is no "indication that the legislature intends to bind itself contractually," which is necessary in order to overcome the general presumption "that a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway, 470 U.S. 451, 465-66 (1985).

The Association is not a party to Honeywell's ELIC contracts. Nor does the Act contemplate the existence of any written contract between the Association and the insurance-buying public. As the lead opinion found, the Honeywell trustee "did not specifically bargain for protection under the Act, and the Act is not expressly or impliedly incorporated into the terms of the GICs." Petitioner's App. at 9a-10a.

The lead opinion relied upon this Court's holding that "state laws are implied into private contracts regardless of the assent of the parties only when those laws affect the validity, construction and enforcement of contracts." Id. at 10a, citing Romein, 503 U.S. at 189, 112 S.Ct. at 111 (emphasis supplied). The statutory provision at issue here does not concern validity, construction or enforcement of ELIC's obligation on the GICs.

In Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978), in describing the constitutional interests behind the Contract Clause, the U.S. Supreme Court stressed that "contracts enable individuals to order their personal and business affairs according to their particular needs and interests." Id. at 245. Here there was most certainly no "private ordering of affairs" pursuant to a contract--the rights which plaintiffs assert are set forth in a statute, imposed upon the parties by the state regardless of the parties' own perception of

their "needs and interests." As the lead Court of Appeals' opinion found, none of the elements of a contract are present: no offer, acceptance, or consideration, no privity between the Association and Honeywell, not even any proof of actual reliance by Honeywell on any particular interpretation of the Act. There is simply nothing in the Act, in any Minnesota court decision, or in the record, which provides any rationale for treating Honeywell's claim under the Guaranty Association Act as contractual in nature.

Both the lead opinion and the concurrence correctly observed that Honeywell in fact had no bargained-for expectations of coverage from the Minnesota Association when its pension-GICs were purchased. It is undisputed that at the time they were initially purchased, and for a majority of the time Honeywell's plans held them before ELIC's insolvency, the GICs were held by non-Minnesota-based trustees.[17] Under Honeywell's theory, if Executive Life had become insolvent on December 30, 1988, none of Honeywell's employees would have received protection from the Minnesota Guaranty Association because at that time the GICs were held by trustees based in California, Massachusetts, and New York.[18] Obviously, given the comings and goings of its trustees, Honeywell could have

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[17]The trustee of the Retirement Savings Plan and the Investment Plus Plan until January 1, 1989 was Chase Manhattan Bank of New York, not IDS. GA.229, 233. The only trustees of the Retirement Investment Plan until January 1, 1989 were Wells Fargo Bank of California and Wellington Trust Co. of Massachusetts. GA.237. All of the GICs at issue here were issued in 1988 and thus, obviously, could not have been originally issued to IDS. IDS Bank & Trust was substituted on the GICs as "contract owner" sometime after January 1, 1989. Honeywell has pointedly failed to produce record evidence of the exact date.

[18] Neither California nor Massachusetts provides any guaranty association protection for Executive Life GICs, and New York only provides coverage up to $1 million. GA.69.

had, and had, no expectations whatsoever concerning how, whether, or from whom the GICs in its pension plans would receive Guaranty Association protection should the issuer fail.

The lead opinion correctly focused on the distinction between the insurance or annuity contracts which govern the rights and duties of insured and insurer, and the Guaranty Association Act, which governs the rights and duties of claimants and the Association. The Association is not named or referred to in any manner in the GICs which are the subject of Plaintiffs' lawsuit. As the Minnesota Supreme Court observed, Honeywell concedes that the Act is not an implied term of the Honeywell GICs. The only source of the Association's obligations is the statute. The fact that the statute refers to the insurance contract does not change the fact that the source of the Association's obligation is the statute, not any contract.

Indeed, the Association's duties are "subject to any conditions imposed by the Association and approved by the Commissioner," and the statute authorizes the Commissioner to "limit" the Association's "liability" and "reduce" its "obligations" on a case-by-case basis. Minn. Stat. § 61B.06, subd.'s 2, 3, 8. Accordingly, policyholders cannot have any specific expectations about benefits they will receive from the Association, and the nature of those obligations can hardly be said to be "fixed" by any "contract."

Many of the cases which Honeywell cites for the proposition that Guaranty Association rights are contractual involve retroactive impairment of obligations to which the government itself is a party. See U.S. Trust, infra; U.S. v. Winstar Corp., 116 S.Ct. 2432 (1996); Indiana Ex Rel Anderson v. Brand, 303 U.S. 95 (1938). Where the state itself is obligated by a statute to a private party, some courts have construed the statute as a "contractual" obligation between the state and the

private party, and therefore subject to Contract Clause protection. U.S. Trust, 431 U.S. at 26. Numerous courts have stressed, however, that Contract Clause treatment of statutes should be strictly limited to cases in which the state is a party to the obligation. See e.g., Brand, 303 U.S. at 100. Here, unlike in Brand and U.S. Trust, there is no allegation that the Guaranty Association Act creates contractual rights between private parties and the State of Minnesota. The State of Minnesota itself is not obligated under the Act to the insureds in any respect. The Act, like much commercial legislation, merely regulates the rights and duties of private parties who, as between themselves, have no contractual relationship.[19]

III. THE COURT OF APPEALS CORRECTLY FOUND THAT RETROACTIVITY OF THE 1992 AMENDMENT WAS FULLY JUSTIFIED UNDER MODERN DUE PROCESS AND CONTRACT CLAUSE STANDARDS.

Before the Legislature enacted the 1992 Amendment, the Act, like the Model Act upon which it was based, did not mention pensions, GICs, trustees, or plan participants. Minn. Stat. § 61B.01, et seq; GA.90-93. In responding to the district court's first certified question, the Minnesota Supreme Court specifically found that "unallocated annuity contracts were not prevalent at the time of the statute's enactment in 1977," and that, therefore, the "legislature likely did not contemplate how the Act specifically applied to these contracts." Honeywell, 518

[19]Honeywell suggests that it contributed to the Minnesota guaranty fund and then, as a result of the Amendment, lost the right to collect from that fund. If this is Honeywell's contention, it is a gross mischaracterization of fact and of Minnesota law. Assessments in connection with insurance company insolvencies are made upon member insurance companies, not upon the insurance-buying public, and only after an insurer becomes insolvent and benefits become payable. Minn. Stat.§§ 61B.07, subd. 1; 61B.07, subd. d.

N.W.2d at 561. As in Carlton, the retroactivity of the 1992 Amendment was justified by the Legislature's legitimate concern that over 10,000 Minnesota residents might end up without guaranty association coverage due to the failure of the 1977 law to specifically address coverage of pension-GICs.

Given the lack of coverage of Minnesota plan participants under the laws of Pennsylvania and other states, and the pressing need to assure that resident plan participants have the protection which the Act was designed to provide regardless of the residency of the Plan trustee, it was certainly reasonable for the Legislature to legislate retroactively in order to assure that an unanticipated coverage situation was addressed in the manner which effectuated the purposes of the Act.[20] The Court of Appeals was manifestly correct in concluding that these circumstances fully justified the retroactive application of the Amendment, under both the due process and contract clauses.

Honeywell argues that trustee coverage was unambiguous under the pre-amendment act, and cites for this proposition the decision of the Minnesota Supreme Court on the district court's first certified question. It is plain from reading the Minnesota Supreme Court's decision, however, that the court, in fact, adopted the Association's contention that specific coverage of pension-GICs was not contemplated by the legislature in 1977 when it enacted the original Guaranty Association statute, which was still in effect at the time of the ELIC insolvency. The Court held, however, that because the non-specific language employed by the 1977 legislature was broad enough to include a trustee-owner of a pension-GIC, the Court could not look beyond that

[20]Honeywell has never contended that "participant-based" coverage, per se, is "irrational". Indeed, Honeywell endorsed the "participant coverage" interpretation of the pre-Amendment law when it applied for benefits from every Guaranty Association in the nation, and it affirmatively argued this position in litigation in Arizona and New Mexico. GA.248-75.

broad language in an effort to conform the statute to legislative intent. 518 N.W.2d at 561. Far from being a "foregone conclusion," as Honeywell would have this Court believe, the Minnesota Supreme Court could easily have adopted the approach of the Pennsylvania Supreme Court in construing that state's comparably-worded guaranty association statute to require both a resident trustee and a resident participant. See Unisys 667 A.2d 1199 (Pa. Commw. Ct.), aff'd, 684 A.2d 546 (Pa. 1996). Or, like courts in New Mexico and Arizona, it could have ruled that GICs are not annuities and therefore not by the act at all. Supra, note 5.

Honeywell argues that there is no "rational connection" between the Amendment and its 27,000 non-resident plan participants, because these individuals were not responsible for the Executive Life insolvency. The lead opinion correctly held, however, that it was not necessary that there be "fault" on the part of the non-resident participants in order for the Amendment to have a rational basis. In Carlton, for example, retroactive amendment was permissible even though the litigating taxpayer was not at "fault." Rather than imposing a "penalty" on the taxpayer as Honeywell asserts, Congress sought to tax transactions for which it had previously accorded preferential treatment. Thus, certain transactions were specifically encouraged under prior law, only to be subject to retroactive taxation when Congress decided that the effect of the earlier law was "unintended." Carlton stands for the proposition that legislatures may legislate retroactively to remedy unintended consequences of earlier legislation, even when the change has an impact on citizens' expectations under prior law.

Whether or not Honeywell's non-Minnesota resident plan participants were responsible for the Executive Life insolvency is beside the point. The rights of those participants are

governed by laws of the states in which they reside. In a guaranty association system which is inherently based upon state residency, there is certainly a rational basis for a Minnesota law which determines coverage of pension-GICs based on participant residency. This particularly so where thousands of Minnesota pension plan participants are without protection from any other state guaranty association.

The Court of Appeals correctly followed the dictates of this Court in Carlton, Romein, Gray, Usery , and Blaisdell. As in these cases, the 1992 Amendment was passed to achieve a permissible legislative objective by a rational means: to avoid what the Minnesota Legislature feared might be an unintended result of the outmoded 1977 statutory language and to provide benefits to thousands of individual Minnesotans who are the intended beneficiaries of the Act's protections.

CONCLUSION

The Association respectfully requests that the Court deny the Petition for a Writ of Certiorari.

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Dated: July 28, 1997.

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

Opinion Number_____

Filing Date:_____

Docket No. 17,741

CHRIS KRAHLING, Superintendent
of Insurance, State of New Mexico,

Plaintiff,

vs.

FIRST TRUST NATIONAL ASSOCIATION;
HONEYWELL, INC.; and HONEYWELL
PENSION AND RETIREMENT COMMITTEE,

Third-party Defendants/Appellants,

vs.

THE NEW MEXICO LIFE INSURANCE
GUARANTY ASSOCIATION,

Defendant/Third-party Plaintiff/Appellee.

APPEAL FROM THE DISTRICT COURT OF SANTA FE
COUNTY
STEVE HERRERA, District Judge

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OPINION

PICKARD, Judge.

1. This case involves the Life and Health Insurance Guaranty Fund, created pursuant to NMSA 1978, Sections 59A-42-1 to -16 (Repl. Pamp. 1995) (the Guaranty Law) and funded by insurers doing business in the state for the purpose of paying benefits to New Mexico residents when one of its member insurers becomes insolvent. As applicable to this case, the Guaranty Law covers "direct . . . annuity contracts and contracts supplemental to . . . annuity contracts, issued or assumed by an authorized insurer[.]" Section 59A-42-3(A).

2. Honeywell invested part of the deferred compensation of more than 2,250 of its New Mexico employees in guaranteed investment contracts (GICs or the contracts) purchased from

Executive Life Insurance Company (Executive Life). After Executive Life became insolvent in 1991, the New Mexico participants sought coverage from the New Mexico Guaranty Association (the Guaranty Association), which denied coverage.

3. The Guaranty Law provides that, "If a member insurer is insolvent, the association, with respect to . . . covered policies of residents issued by foreign . . . insurers, shall . . . guarantee . . . all the covered policies of the insolvent insurer[.]" Section 59A-42-7(A)(1). "'[R]esident' means any person who resides in this state . . . and to whom contractual obligations are owed." Section 59A-42-4(I).

4. The specific issues in this case are whether the GICs come within the definition of annuity contracts and whether contractual obligations are owed to the trustee of the Honeywell retirement plan, who owns the GICs and who is a Minnesota resident, or to the New Mexico resident employees. On summary judgment, the district court ruled that the GICs were not annuities within the definition of NMSA 1978, Section 59A-20-2 (Repl. Pamp. 1995), and that the obligations were not owed to New Mexico residents. On these issues of first impression, we conclude that the GICs were not annuity contracts meriting coverage under our statutory definition of annuities. We affirm the district court's decision to that effect, and therefore we do not address the court's alternative ground for denying coverage.

FACTS/BACKGROUND

5. Executive Life was an insurance company domiciled in California. The parties agree that Executive Life was insolvent in 1991 and was placed in conservatorship. Honeywell is a Delaware corporation, which has plants and employees in

New Mexico, but whose headquarters and principal place of business are in Minnesota. Honeywell sponsored for its employees various savings and retirement plans that were tax-sheltered under Internal Revenue Code § 401(k). 26 I.R.C. § 401(k) (1994). Employees who participated in these plans could defer income and choose from among several investments, including a "fixed income fund." Other investment options included a diversified stock fund, a government securities fund, a Standard and Poor's 500 fund, and a fund made up of Honeywell stock.

6. The fixed income fund invested in, among other things, a portfolio of contracts issued by insurance companies. The insurance contracts in which the fixed income fund invested are called, among other names, guaranteed investment contracts (the name the parties use on appeal), group annuity contracts (the name on one of two cover sheets for the contracts), and group limited premium deposit pension contracts (the name on another cover sheet). In essence, the contracts provided that Honeywell's trustee would deposit, within a fixed number of days or months, either a fixed amount of money or not more than a stated amount of money; the money would earn a fixed rate of interest payable annually; and the fund value would be paid to the trustee in one, two, or three installments over the course of one, two, or three years, which would occur several years after the deposit was made. All of the contracts in this case were purchased in 1988 and were to be paid after 1991 when Executive Life became insolvent.

7. The Guaranty Association sought a declaration that Honeywell's contracts with Executive Life were not within the scope of the Guaranty Law. The district court granted the Guaranty Association summary judgment holding, in part, that Executive Life's GICs issued to Honeywell were not

annuities under the New Mexico's statutory definition because they did not provide periodic payments dependent on the continuation of human life. See § 59A-20-2(A).

8. Honeywell appeals, asking this Court to enforce the Guaranty Association's obligation to provide coverage for the plan participants. For the reasons that follow, we affirm.

DISCUSSION

9. Where there is no issue of material fact, summary judgment is proper where the moving party is entitled to judgment as a matter of law upon clear and undisputed facts. See First Nat'l Bank in Albuquerque v. Nor-Am Agric. Prods., Inc., 88 N.M. 74, 80, 537 P.2d 682, 688 (Ct. App. 1975). The decision here turns on the statutory definition of an annuity as applied to the GICs, not on any disputed facts. Interpretation of statutes is a question of law which we review de novo. See State v. Rowell, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995).

10. We begin our analysis by recognizing that our decision must be based on the wording of the New Mexico statute and that cases from other jurisdictions are persuasive only to the extent that their statutes are similar to ours. See State v. Dunsmore, 119 N.M. 431, 434, 891 P.2d 572, 575 (Ct. App. 1995); El Centro Villa Nursing Ctr. v. Taxation & Revenue Dep't, 108 N.M. 795, 797-98, 779 P.2d 982, 984-85 (Ct. App. 1989). Thus, for example, cases holding that GICs are not annuities based on statutes that exclude "any annuity contract or group annuity certificate which is not issued to and owned by an individual" or cases holding that GICs are annuities based on statutes that specifically include "unallocated annuity contracts" which in turn include "guaranteed interest contracts" will not be persuasive in New

Mexico. See Oklahoma Life & Health Ins. Guar. Ass'n v. Hilti Retirement Sav. Plan, 1997 WL 10927 at *2 (Okla. 1997); Unisys Corp. v. Texas Life, Accident, Health & Hosp. Serv. Ins. Guar. Ass'n, 943 S.W.2d 133, 137 (Tex. Ct. App. 1997). Rather, we decide this case based on New Mexico's statutory language, informed by cases that consider similar language under similar legislative and administrative circumstances.

11. We first consider the Legislature's stated purpose in enacting the Guaranty Law:

> The purpose of this article is to provide a mechanism to facilitate continuation of coverage, payment of covered claims under certain insurance policies, to avoid excessive delay in payment and avoid financial loss to claimants or policyholders because of insolvency of an insurer, to assist in detection and prevention of insurer insolvencies and provide an association to assess the cost of such protection among insurers.

Section 59A-42-2 (emphasis added). On its face, then, the purpose of the Guaranty Law, in its clearest terms, is to protect insureds (policyholders or claimants under policies) from loss resulting from an insurer's insolvency. More specifically, when an insurer becomes insolvent, the Guaranty Law works to protect those policyholders and claimants who would suffer loss. The import of this language is that it applies to insurance companies as insurers.

12. Honeywell argues strenuously that the GICs were annuities under New Mexico statutory law and therefore entitled to coverage by the Guaranty Association. We set out Honeywell's argument, and give our reasons for rejecting it. Honeywell's argument consists of two branches. According to

Honeywell, (1) the Executive Life GICs are annuities because they are agreements to make periodic payments dependent upon the continuance of human life; and (2) the GICs are also annuities because of the participant's right to purchase individual annuities upon retirement.

13. Section 59A-42-3(A) outlines the scope of the Guaranty Law. It states:

> A. Chapter 59A, Article 42 NMSA 1978 applies to direct life insurance policies, health insurance policies, annuity contracts and contracts supplemental to life and health insurance policies and annuity contracts, issued or assumed by an authorized insurer, or assumed by an unauthorized insurer directly or indirectly from an authorized insurer.

(Emphasis added.) New Mexico statutory law defines annuities as follows:

> A. an "annuity" is a contract under which obligation is assumed by the issuer to make periodic payments for a specific term or terms where the making or continuance of all or some such payments or the amount of any such payment is dependent upon continuance of human life. . . .

Section 59A-20-2 (emphasis added). Honeywell argues that the GICs were annuities because Executive Life's "obligations as to each participant's investment in the GICs were 'dependent upon the continuance of human life[.]'"

14. Excluding those cases that interpret materially different statutes for the reasons stated above and excluding those cases

that appear to simply follow what we perceive to be the two leading cases, we find that the opposing views and arguments are well set forth in Board of Trustees of Maryland Teachers & State Employees Supplemental Retirement Plans v. Life & Health Insurance Guaranty Corp., 642 A.2d 856 (Md. 1994) (holding Executive Life GICs to be annuities) [hereinafter Board of Trustees], and Arizona Life & Disability Insurance Guaranty Fund v. Honeywell, Inc., 927 P.2d 806 (Ariz. Ct. App.) (holding Executive Life GICs not to be annuities), review and cross-petition for review granted (1996) [hereinafter Arizona Life]. Honeywell relies heavily on the Maryland case. There, the court found the same GICs as those in question here to be annuities under Maryland law. The court looked at the possibility that Executive Life could be called upon, whenever a participant died, to pay its pro rata share of that participant's account in the plan at the promised rate of interest. Board of Trustees, 642 A.2d at 861. The court also looked to the fact that if Executive Life was called upon to pay prematurely in the event of a participant's death, the company's investment returns at that particular moment might be less than what it was committed to pay at maturity. This situation would make Executive Life's assumption of economic risk life-contingent insofar as Executive Life risked economic loss if a participant died before maturity of the GIC. Id. The court added that Executive Life's contractual assumption included the economic risk, though remote, "that a catastrophe or epidemic would result in the deaths of large numbers of participants in a relatively brief span of time." Id.

15. The Guaranty Association answers that the Executive Life GICs were not annuities because Executive Life was not promising periodic payments to anyone over the course of a lifetime, such that payments would continue beyond a fixed

term if a beneficiary continued to live past that time. The Guaranty Association argues that assumption by the insurer of the risk of longevity is key to the definition of an annuity. As authority for its position, the Guaranty Association relies on the Arizona case. The Arizona Life court, examining the statutory definition and Honeywell's similar argument there, said an annuity existed where

> some or all of the payments from the financial institution to the annuitant "is dependent upon the continuance of human life." A.R.S. § 20-254.01 (1990) (emphasis added). Honeywell's interpretation of the statute would require us to hold that a contract is an annuity if the making or amount of the payments "may" depend on the continuance of human life, or if the payments "potentially" depend upon the continuance of human life. [Executive Life's] payments were not affected by the death of an employee alone, but were affected only if the trustee also elected to pay the employee's benefits by a withdrawal from the GIC. This further condition means that payments under the GIC's did not depend on the continuance of human life.

Arizona Life, 927 P.2d at 811-12.

16. We find no particular fault with the Maryland Court of Appeals' analysis in Board of Trustees. We note, however, that there was an extensive legislative history in Maryland, as well as attorney general opinions and insurance commission interpretations of Maryland law to justify that court in deciding that the GICs were annuities. Board of Trustees, 642 A.2d at 862-66. In addition, the court was able to construe Maryland's statutory definition of annuities more broadly

than we may here. That state's definition included contracts "providing for" annuities, and the court could more reasonably construe this language as encompassing the GICs with options specifying annuities. Id. at 861. There is, however, no such history or statutory language in New Mexico. We simply face our statutory definition of annuities and the GICs. Therefore, based on New Mexico's plain statutory language and the nature of the GICs in this case, we conclude that the Arizona Life court's analysis provides a better rationale for deciding this case.

17. The Guaranty Association also answers Honeywell's assertion that the GICs were annuities by arguing that the GICs did not mandate withdrawals upon the death of a plan participant; the GICs only provided for that as a possibility. In its reply brief, Honeywell says that this argument is wrong because the plan required withdrawal upon the death of a participant. The plan, however, does not dictate that payment come from the GICs. Rather, the plan left withdrawals of the funds from the GICs to the trustee's discretion. The trustee had the discretion to pay the beneficiary from funds other than Executive Life, without demanding premature withdrawal of a portion of the GIC. The Guaranty Association represents that in fact funds have rarely, if ever, been withdrawn prematurely; death benefits were paid from other funds. The plan only required that plan benefits be distributed upon a participant's death, but the source of the funds with which to pay the plan benefits was left open ended. Also going against Honeywell is that the very section of the "Investment Plus Plan" it cites to, claiming withdrawals were mandatory, allows a participant's beneficiary to choose an annuity instead of payment. The option of expressly choosing an annuity in place of payment

after the death of a participant implies strongly that the payment was not itself an annuity.

18. We agree with the Guaranty Association. Under the GICs, a plan participant held an option to purchase an annuity after retirement. This option is perhaps the clearest demonstration that the GICs were not themselves annuities. An option to purchase an annuity does not create an annuity contract, only the possibility of a separate contract for an annuity in the future. See Arizona Life, 927 P.2d at 814 (provision allowing purchase of annuity is not itself an annuity); see also Boothe Fin. Corp. v. Loretto Block, Inc., 97 N.M. 496, 498, 641 P.2d 527, 529 (Ct. App. 1982) (exercise of option to purchase land converted option to bilateral contract). Since only an exercise of the option to purchase an annuity contract could create an annuity, it follows that the Executive Life GICs were not themselves annuity contracts.

19. We hold that the Executive Life GICS were not annuities under Section 59A-20-2 because payment was not dependent upon continuance of human life. Payment did not depend on the continuation of human life because there was no requirement for the trustee to pay out of the GICS whether an employee died, retired, or transferred funds. But even if the trustee had to pay out of the GICS at the death of a participant, this seems to make payment contingent not upon the continuance of human life, but contingent upon death, the very opposite of what defines an annuity. Payment did not continue in the event of the continuance of human life as required by the statute.

20. Honeywell attempts to counter this argument by its contention that the GICs were required to be paid in installments over the course of several years and would not be paid in the same amounts if participants died and the trustee were to elect to pay those participants' shares out of the

GICs, as the documents allowed. Thus, Honeywell contends that the GICs come within the exact definition of annuity under Section 59A-20-2(A), i.e., (1) periodic payments (2) dependent on the continuation of human life. We disagree because Honeywell's argument rests on a possibility that "may" occur--the trustee's election to take participants' shares out of the GICs--whereas the statutory definition states that "an 'annuity' is [not "may be"] a contract . . . to make periodic payments . . . where the making or continuance of all or some such payments or the amount of any such payment is [not "may be"] dependent upon continuance of human life." To the extent that Honeywell's argument ignores the precise wording of the statute, we must reject it. See Arizona Life, 927 P.2d at 811-12 (rejecting this same argument for the same reasons). We therefore approve the decision of the trial court on these grounds.

21. Finally, Honeywell argues generally that the purpose of the Guaranty Association is to protect New Mexico residents. As such, Honeywell urges us to liberally construe the Guaranty Law because of its humanitarian policy and to enforce coverage in this instance. We decline to give the Guaranty Law any construction but a reasonable one since the languageof the statute is clear as applied to the GICs in this case. See United Water N.M. Inc. v. New Mexico Pub. Util. Comm'n, 121 N.M. 272, 276, 910 P.2d 906, 910 (1996) (statute should be given reasonable interpretation in accordance with the Legislature's apparent purpose); see also Unisys Corp., 943 S.W.2d at 140 (even though Texas Guaranty Act provided for liberal construction, court was not permitted to ignore statutory language excluding coverage of certain unallocated annuity contracts). We therefore decline to construe the Guaranty Law more broadly than its plain languageallows.

CONCLUSION

22. For the foregoing reasons we affirm the district court's decision.

23. **IT IS SO ORDERED.**

s/s
LYNN PICKARD, Judge

WE CONCUR:

s/s
THOMAS A. DONNELLY, Judge

s/s
RICHARD C. BOSSON, Judge

No. 97-9

Supreme Court, U.S.
FILED
AUG 7 1997
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

HONEYWELL, INC.; HONEYWELL PENSION AND RETIREMENT COMMITTEE, on their own behalf and on behalf of the Honeywell Retirement Investment Plan, Investment Plus Plan of Honeywell, Inc., and Honeywell Retirement Savings Plan; and First Trust National Association,

Petitioners,

v.

MINNESOTA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-9

HONEYWELL, INC.; HONEYWELL PENSION AND RETIREMENT COMMITTEE, on their own behalf and on behalf of the Honeywell Retirement Investment Plan, Investment Plus Plan of Honeywell, Inc., and Honeywell Retirement Savings Plan; and First Trust National Association,

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v.

MINNESOTA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION,

Respondent.

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REPLY BRIEF FOR PETITIONERS

In this case the Eighth Circuit—sitting *en banc* and sharply divided with respect to both result and rationale—upheld a Minnesota law that retroactively cancelled obligations owed to petitioners in order to free up funds for Minnesota residents left unprotected in an insurance company insolvency. As we pointed out in our petition, this decision gives too little weight to established principles under the Contract Clause and Due Process Clause, which place severe restrictions on state power to extinguish outstanding debts, whether public or private, even in pursuit

of laudable ends. The critical question is not whether Minnesota may act to assist its own citizens (obviously it can), but whether it may find the means to do so by eliminating the obligations owed to petitioners.

Respondent defends the decision below on two primary grounds, neither of which is well-founded. To begin with, it asserts that "modern standards" of constitutional law allow States great freedom to enact legislation, even retroactive legislation upsetting "settled expectations," in order to serve public goals. *See* Br. in Opp. 13-23; 27-30. What respondent largely ignores, however, is that recent cases of this Court, applying both the Contract Clause and the Due Process Clause, require that a State do more than identify a valid public purpose to be served by its legislation; it must also establish that its decision to abrogate a contractual right, or retroactively alter an obligation, is a reasonable means of achieving that purpose. *See* Pet. 18-21. Respondent, like the Eighth Circuit before it, utterly fails to make that showing.

Respondent thus presses a second argument: that the obligation at issue here, having been embodied in a prior statute, is not subject to any substantial constitutional protection. *See* Br. in Opp. 23-27. This argument itself raises important questions about state power to retract what it has conferred. Furthermore, as advanced by respondent, it rests upon the mistaken view that obligations created by statute are never considered to be contractual in nature—unless they are obligations assumed by the State itself—and thus may be freely, and retroactively, taken away. *See* Br. in Opp. 21 n.15. This theory not only contradicts precedent from this Court, *see, e.g., Coombes v. Getz*, 285 U.S. 434 (1932), but would vastly expand state power to alter, after-the-fact, the structure of legal transactions and to destroy outstanding property interests. This Court has never gone so far as to declare that a State may eradicate "settled expectations" of pay-

ment merely because the funds could be put to other use, and it should reject the invitation to do so now.

1. Respondent goes on at considerable length about the financial problem caused by the insolvency of Executive Life. Even if its portrayal were accurate,[1] however, it is largely beside the point. Petitioners do not question that Minnesota has a legitimate interest in protecting Minnesota residents harmed by the insolvency. The question, rather, is whether, despite other readily-available options, it could elect to relieve the Association of its debt to petitioners as the means of providing that protection.

On this issue respondent has remarkably little to say. Although it seems to accept that a State could not seek to assist residents by walking away from its own obligations, *see United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), it apparently believes that there is no serious obstacle to achieving that end by cancelling the obligations of private entities. But, insofar as the Contract Clause is concerned, that notion has an obvious flaw: the principal object of that clause was to prevent state legislatures from cancelling the debts of private parties. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 503 (1987); Pet. 18-19. Two decades ago, the Court—while divided on other questions—was unanimous in concluding that the Contract Clause continues to "forbid[] . . . state laws that diminish the duties of a contractual obligor . . . ." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 n.16 (1978).

The distinction put forth by respondent is also at odds with familiar principles of due process. Thus, while this

[1] Grouping Executive Life with other companies, respondent talks of "jeopard[y]" to more than "$440 million." Br. in Opp. 1. The Eighth Circuit, referring to Executive Life alone, spoke about possible exposure of $111 million. But, as we have pointed out (and respondent does not contest), "approximately 90% of the value of Executive Life annuities should be recovered as a result of the liquidation proceeding." Pet. 8 n.6.

Court has allowed States to address a particular problem by imposing retroactive liability on entities fairly deemed responsible for the problem, *see e.g., Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), it has not declared the existence of a broad power to create retroactive liability in the absence of that nexus. Here, the funds to provide for resident victims of the Executive Life insolvency are being diverted from other victims of that insolvency (petitioners and, ultimately, the non-resident beneficiaries of their trust plans) even though full protection for their investments had been unambiguously provided in prior law. *See Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Ass'n*, 518 N.W.2d 557 (Minn. 1994).[2] To relieve the Association of that debt seems, if anything, an even more inapt means of serving a public goal than allowing the State to declare its own obligations null and void.

It is thus an enormous, and wholly unwarranted, step to find (as the Eighth Circuit did) that States may extinguish the obligations of private parties as an indirect means of financing public ends. Were that view correct, it would mean that, even if the Association and the Trustee had entered into a written contract providing (as the statute provided) that the Association would "guarantee [and] assume" the obligations of Executive Life, and further providing (as the Minnesota courts determined) that the entire amount of a Guaranteed Investment Contract held by a resident trustee was such an obligation, the State nevertheless could cancel the right to payment on the ground that it wished to conserve Association re-

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[2] The abrogation of an obligation to plan trustees (and, thereby, to non-resident beneficiaries), as a means of financing benefits to uncovered residents, would be comparable to a decision by Congress to impose the costs of black-lung benefits retroactively on other coal miners, rather than on the companies that employed them and profited from their work. *Compare Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

sources for its own preferred beneficiaries. This is an astonishing proposition, yet one that follows inexorably from the constitutional theory relied on by respondent. Whether analyzed under the Contract Clause or the Due Process Clause, this redirection of funds, at the expense of a narrow class of obligees, runs contrary to the basic principle against "forcing some people alone to bear public burdens which . . . should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).[3]

2. Respondent takes a second tack as well: that no obligation worthy of serious constitutional protection actually existed. Stressing that the obligation was embodied in a statute, respondent advances the view that its elimination by a later statute, even on a retroactive basis, is of little constitutional moment. This theory, however, also raises more questions than it resolves.

Respondent sets forth its proposed rule in bold, absolute terms: "[a] statute is a statute, and a contract is a contract. Unless the state itself is obligated by the statute, a statute is not a contract." Br. in Opp. 21 n.15. The first problem with this argument, of course, is that the Eighth Circuit declined to accept it. Five dissenting judges and two concurring judges concluded that the rights conferred by the statute (prior to amendment) were contractual in nature and thereby protected by the Contract Clause. Pet. App. 19a-21a (concurring opinion); 26a-27a (dissenting opinion).

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[3] This Court has given particularly close scrutiny to legislation that targets a small class of private parties. *See Allied Structural Steel*, 438 U.S. at 250. The 1992 Minnesota Act amply fits that description, regardless of whether Honeywell was the only company affected or was one of a handful of companies. *See* Br. in Opp. 8 n.3. In the court of appeals, it should be noted, respondent itself stated that, of the relevant companies, "only Honeywell had a plan trustee which was domiciled in Minnesota." C.A. 8 Br. at 3.

More importantly for present purposes, this Court itself has rejected the notion that rights embodied in state law are outside the protection of the Contract Clause. In *Coombes*, for example, this Court recognized that obligations created by a rule of law—there, a provision of the California Constitution—could be the basis for a cause of action arising "upon the contractual liability created in pursuance of the rule" (285 U.S. at 442), even though the obligor had no direct contractual relationship with the creditor.[4] Moreover, in *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 429-30 (1934), the Court expressly stated that certain state laws "enter into and form a part of [a contract], as if they were expressly referred to or incorporated in its terms." *See General Motors Corp. v. Romein*, 503 U.S. 181, 189 (1992) (same). *See also Steamship Co. v. Joliffe*, 69 U.S. (2 Wall.) 450 (1865) (statutory obligation binding on parties to a transaction within its scope). It is thus well-settled that *some* obligations imposed by statute or other provisions of state law are properly treated as part of, or legally equivalent to, a contractual relationship.

Once it is accepted that statutory rights and contractual rights are not mutually exclusive, the question then turns to whether a particular law gives rise to an obligation protected by the Contract Clause. That inquiry requires a close examination of the text of the law and the nature of the duty at issue. *See Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 104-05 (1938). Here, the Minnesota statute, in plain terms, required the Association to "guarantee, assume or reinsure . . . the covered policies of

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[4] Respondent argues that the point was "conceded" in *Coombes*. *See* Br. in Opp. 17-18. But the issue is one of federal law, and the Court thus could not apply the Contract Clause, regardless of any concession, if (as respondent says) a statute never creates a right subject to its protection. *See Coombes v. Getz*, 285 U.S. at 449-50 (Cardozo, J., dissenting) (Court "determines for itself whether within the meaning of the Constitution the product is a contract to be protected by the power of the nation").

residents" (which included petitioner Trustee) and further required it to "make or cause to be made prompt payments of the impaired insurer's contractual obligations which are due and owing to residents." Minn. Stat. Ann. ch. 61B.06 subd. 2. Given the explicit language of these responsibilities, and their direct linkage to contracts between insurers and resident policy holders, it is most appropriate, for the purpose of applying constitutional standards, to treat the Association as affirmatively guaranteeing and then directly taking on the "contractual obligations" of the failed insurer. *See Indiana ex rel. Anderson v. Brand*, 303 U.S. at 104-05 (noting that statute speaks in contractual terms). The Contract Clause would unquestionably come into play in the event that the terms of the statute had been directly incorporated into a written contract—even if they were included solely because of the mandatory nature of the law itself—and it is hard to see why the protection of that Clause should be lost in the absence of incorporation when the obligations are no less binding. In either case, the Association would be liable to the Trustee, and in either case that fully-matured liability would have been cancelled by the subsequent legislation.

Although respondent clearly thinks otherwise, state law and contracts do not intersect only with respect to matters of "validity, construction, or enforcement." *See* Br. in Opp. 24 (quoting Pet. App. 10a); *see also General Motors Corp. v. Romein*, 503 U.S. at 189.[5] Quite apart from the fact that this Court has never laid down any such blanket rule, and the fact that to do so would require a repudiation of *Coombes*, that view would perversely give States greater power to extinguish substantive rights than to alter remedies to enforce those rights. In *Blaisdell*,

[5] We note that, in quoting from the plurality opinion below and the opinion of this Court in *Romein*, respondent tries to fashion its absolute principle by leaving out the limiting words "[f]or the most part," which appear in both opinions.

however, the Court, quoting the same language relied on by respondent, made clear that even the acknowledged power of a State to amend remedial laws extended only up to the point that its action impaired a substantive right. 290 U.S. at 430. *See also W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935); *W.B. Worthen Co. v. Thomas*, 292 U.S. 426 (1934). While the importance of this distinction has waned over the years, *see United States Trust Co.*, 431 U.S. at 19 n.17, it would wholly invert the historical understanding to declare now that *only* the terms of state remedial laws are sheltered from abrogation by the Contract Clause.

Respondent makes a corollary effort to suggest that the obligation imposed by the statute was somehow uncertain (and presumably, therefore, only clarified and not extinguished). *See* Br. in Opp. 27-28. But this argument makes no headway at all. Examining that very question, the Minnesota Supreme Court expressly held "that resident trustees who own unallocated annuity contracts are unambiguously entitled to coverage under the terms of the Act prior to the Amendment." 518 N.W.2d at 561. *See also id.* ("there can be no doubt that a plan trustee who owns an unallocated annuity contract is a person to whom contractual obligations are owed.") Indeed, it was the very clarity of the obligation that led the Minnesota court to declare that the prior law was *not* (as respondent had argued) "an unintended windfall for non-resident employees who are participants in pension plans with a Minnesota trustee." *Id.*

Although this opinion was handed down after the 1992 amendment to the law, the Minnesota Supreme Court relied in large part on an earlier decision of the state court of appeals—handed down in 1987, *five years* before the law was altered—holding that the "covered policies" under the Act plainly embraced "unallocated annuity contracts," including guaranteed investment contracts. *Minnesota Life and Health Ins. Guar. Ass'n v. Department of Commerce*, 400 N.W.2d 769, 772-74 (Minn.

App. 1987). Respondent tries to avoid the import of that case by contending that it involved issues relating to the assessment base rather than to payments on the guarantee, but that point is utterly irrelevant because (as the Minnesota Supreme Court observed) the assessment base and the payment guarantee are both governed by the single term, "covered policies"—which is what the 1987 decision held plainly to include the guaranteed investment contract. 518 N.W.2d at 562 n.11. The Minnesota Supreme Court, in fact, pointed out that the Association itself had, since the 1987 ruling, "assessed insurers issuing unallocated annuity contracts based upon the amount of premiums received from resident contract owners, not based upon amounts attributable to individual resident beneficiaries." 518 N.W.2d at 562. That behavior would be hard to reconcile with an understanding that "coverage obligations [were] owed solely to resident plan participants." *Id.*[6]

3. All defenses by respondent notwithstanding, the decision of the Eighth Circuit represents a troubling dilution of the protections traditionally afforded against state abrogation of outstanding debts. As the dissent below stated, "[t]he Minnesota Legislature in this case deliberately effected a retroactive change in the law to allow the Association to avoid a $110 million payout." Pet. App. 30a. Yet, focusing largely upon one side of the equation, the majority (like respondent here) omitted any careful inquiry into the reasonableness of cancelling obligations owed to the trustee for non-resident (and, therefore, non-

[6] Respondent makes several references to the 1992 law as "curative" without explaining why, if the court of appeals was in error, the legislature made no effort to fix the statute in the years following its decision. Furthermore, the idea that the coverage of the prior law was misdirected is belied by the fact, noted by the Minnesota Supreme Court, that the laws of 14 States provide coverage to resident holders of an unallocated annuity contract. 518 N.W. 2d at 562. As we discussed in the petition, therefore, the characterization of this law as "curative" would deprive that term of all but the most superficial possible meaning. *Cf. United States v. Carlton*, 512 U.S. 26 (1994).

voting) beneficiaries in order to divert funds to resident beneficiaries. *See* Pet. App. 31a (Arnold, C.J., dissenting) ("[i]t is not a coincidence that most of the people injured by this statute cannot vote for the Minnesota Legislature"). Without proper scrutiny of the means used to serve public ends, however, the result is that contractual obligations may be deemed secure only unless and until a State determines that the funds would be better put to some other use. That disregard of property rights is a departure from long-recognized principles, and this Court should grant review to correct it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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